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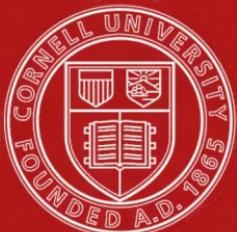
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LEADING CASES
IN THE
LAW OF REAL PROPERTY
DECIDED IN THE AMERICAN COURTS.

With Notes

BY

GEORGE SHARSWOOD, LL.D.,

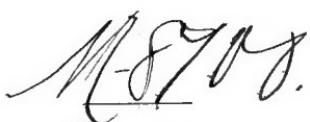
AND

HENRY BUDD,
OF THE PHILADELPHIA BAR.

VOL. III.

NOTES BY HENRY BUDD.

PHILADELPHIA :
M. MURPHY,
LAW BOOKSELLER, PUBLISHER, AND IMPORTER,
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A handwritten signature in black ink, appearing to read "M. Murphy".

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ADDENDA ET CORRIGENDA.

THE decision in *Allen's Estate*, 14 W. N. C. 439, cited on page 419 of Volume II., has, since the publication of that volume, been reversed, the Supreme Court of Pennsylvania, in the *Pennsylvania Company's Appeals*, 16 W. N. C. 486, holding the remainder to be vested. In delivering the opinion of the appellate court PAXSON, J., said: "The court below attached much weight to what they believed to be the intent of the testator, and their ruling was evidently designed to carry it into effect. If that intent had been clearly expressed it would govern this case. It is not, however, expressed at all, and is only a matter of inference. It is possible their view as to the testator's intent may be the correct one, and that Mrs. Allen never intended her husband to have more than a life interest in this third of her estate. It is more probable, however, that the contingency of his inheriting from his children never occurred to her or the draftsman of the will. It often happens that by the death of persons to whom a vested interest has been given the property passes to some one not contemplated by the testator. It may be so here, but the intent of the testatrix is not so evident as to override what we regard as the settled law as to the vesting of a bequest under the will."

In Vol. I., on page 407, the State of Ohio is included in the list of States in which the widow, besides being subject to a forfeiture of estate for the commission of waste is also subject to action for damages for the same cause. C. A. Seiders, Esq., of the Ohio Bar, has very kindly suggested that such inclusion is incorrect, and that an action for damages will not, in Ohio, lie against the widow; this has caused a re-examination of the subject. It is true that in *Allen v. McCoy*, 8 Ohio, 465, it is said that "the common law doctrine of waste has never been recognized in Ohio, either as an incident of title or as affording a remedy for wrong;" and a somewhat similar announcement was made in *Crockett et al. v. Crockett et al.*, 2 Ohio St. 185; but it will be seen upon examination that the language of the Court referred rather to the rule establishing what should constitute waste on the part of the widow than to the penalty to which she would be liable for commission thereof, the question in the

first case being whether the widow could have dower in wild lands, it being argued that she could not strip them of timber without being guilty of waste, and that they were good for nothing but as land from which timber might be removed. Did we, therefore, rest on the authority of decisions alone we would see no reason to change the first statement; but when we turn to the statutes we come to a different conclusion; the statute forbidding waste by a dowress expressly subjects her to forfeiture, and says nothing about a recovery of damages; the statute forbidding waste by tenant by the courtesy provides for forfeiture and adds, "such tenant by this courtesy shall be liable in damages . . . for the waste done or suffered," R. S. § 4177; now as the two statutes are part of the same revision, as a special penalty is recited in each case, *i. e.*, forfeiture, and as to that penalty is expressly added in the one case liability to an action for damages, while there is no mention of any such action in the other, we have come to the conclusion that, in all probability, for we have found no direct decision on the question, the dowress is not liable to an action for damages for waste, though compensation may be recovered upon an incidental account decreed in the case of an injunction, see *Crockett v. Crockett, supra*; *Jenks et al. v. Langdon et al.*, 21 Ohio St. 368; *Converse v. Hawkins*, 31 Id. 209.

I desire to express my sense of obligation to Mr. Seiders, whom I have not the honor of knowing personally, for the kind interest he has manifested.

H. B.

LEADING CASES IN THE LAW OF REAL PROPERTY.

Joint Tenancy.

JOHN HAUGHABAUGH *v.* HANNAH HONALD.

Constitutional Court of South Carolina, November Term, 1812.

[Reported in Constitutional Reports, 1st series, p. 90.]

The grantee of 100 acres of land dies seized, leaving a wife and three daughters.

By his will, in 1761, he gives his land to his wife and daughters and their heirs. The wife dies; then one of the daughters dies; the two surviving daughters marry, and they and their husbands occupy the land, a fence dividing their possessions. In 1786, one of them dies, leaving a son who conveyed a moiety of 100 acres to the plaintiff: *Held*, that the sisters were entitled in joint tenancy, and that the whole vested in the survivor, to the exclusion of the son of the deceased.

A fence dividing the possessions of two joint tenants is not of itself sufficient proof of a severance.

The Act of Assembly of 1734 did not do away the right of survivorship between joint tenants, but only allowed them to devise their estates, and by that means to sever the joint tenancy.

The Act of Assembly of 1748 did not alter the properties of estate in joint tenancy, but provided a mode of severing the estate by partition.

THIS was an action to recover a moiety of 100 acres, originally granted to Anthony Slack. A. S., by his last will, in 1761, devised the 100 acres to his wife and three daughters, and their heirs. The widow and three daughters occupied the land after his death; afterwards the widow died intestate; then one of the daughters died an infant and unmarried. The two surviving daughters married; one of them with Mark Honald; the other with John Seastrunk. Seastrunk and Honald, and their wives, lived on the same tract, and a fence divided their possessions. In 1786, Mark Honald's wife died, leaving

one son, David Honald. Mark Honald continued in possession after his wife's death, married a second wife, and died in the year 1795, leaving a widow, the defendant, Hannah Honald, who has continued in possession from the time of his death. John Seastrunk and his wife continued in possession of their part until 1798, when they conveyed a moiety of the said 100 acres to one John Wainwright, which moiety they describe as bounded on the upper side by part of the said tract held by the heirs of Mark Honald. This deed was executed by the wife of Seastrunk, but she did not release her inheritance. John Wainwright conveyed the part purchased of Seastrunk to the plaintiff. David Honald, after he came of age, conveyed to the plaintiff the other moiety.

The defendant contended that at the death of the wife of Mark Honald her interest survived to her sister, Mrs. Seastrunk, and that nothing passed to the plaintiff by the conveyance of David Honald.

His Honor charged the jury that, in the death of Mrs. Honald her part survived to Mrs. Seastrunk, her sister, and no estate in the land descended to David Honald, the lessor of plaintiff.

Verdict for defendant.

Motion for a new trial.

COLCOCK, J.—It is conceded that the daughters of Anthony Slack held as joint tenants. The only question then is, "Was there any division in their lives of the property?" It does not appear that there was any division or any act of the parties which the Court can construe into a severance of the estate. On the death of Mrs. Honald her sister took the whole by survivorship. The land did not descend to the son, and, therefore, he had no right to convey to the plaintiff. As the plaintiff must recover on the strength of his own title, the defendant's need not be inquired into. I am of opinion the motion should be rejected.

BREVARD, J.—The plaintiff must recover in this action on the strength of his own title, and not on the weakness of his adversary's. It was contended for the plaintiff: 1st. That on the death of Mrs. Honald, in 1786, the estate did not vest in Mrs. Seastrunk, by survivorship, for that the Act of Assembly of 1748, P. L. 217, takes away the right of survivorship. 2dly. That the evidence given in the case

was sufficient to prove a severance of the joint estate before Mrs. Honald's death. My opinion is the verdict ought to stand. The Act of Assembly of 1748, only provides an easier mode for obtaining partition of joint estates; but does not change their nature or properties. The *jus accrescendi* was abolished by the Act of 1791, and not before. This Act is a legislative declaration of what the law was before that time. On the death of Mrs. Honald, in 1786, the whole estate vested in her sister, unless the joint tenancy had been severed in her life. If there was clear proof, or even such evidence as would amount to a strong probability, of a severance between the joint tenants, by agreement, or, by a bargain and sale of Mrs. Seastrunk's moiety (which would operate a severance), before Mrs. Honald's death, my opinion would be different. A parol agreement and partition was good at common law; Co. Lit. 165, 171; and notwithstanding the Statute of Frauds, such a partition may be valid, if the line be sufficiently marked on the ground, and manifested by a separate distinct possession for a sufficient length of time: 1 Binney, 216. The evidence in this case was too vague and slight to found a presumption of a legal and valid partition, even by parol. There was no evidence of agreement to divide. The joint tenants were both married women, and would not be bound by any agreement made by their husbands, unless their consent was obtained agreeably to law. The evidence of a separate possession was too loose to afford any solid ground to presume a partition. This evidence consists chiefly of proof that Mark Honald was in possession of a part until his death, and that in 1798, John Seastrunk and his wife conveyed to John Wainwright a moiety of the tract and the conveyance in describing the land, states that it is bounded on the upper side by part of the said tract held by the heirs of Mark Honald. Mrs. Seastrunk is joined in this deed, but there is no renunciation of her inheritance. The argument drawn from the language of this deed in the description of the premises has no weight. It cannot by intendment and implication divest Mrs. Seastrunk of her inheritance. For any thing that appears to the Court, she has never consented to part from her estate. The deed could not estop her, even if it were more explicit than it is.

E. H. BAY, J.—There is no doubt that the will of Anthony Slack creates a joint tenancy; and it is very clear that unless there is a severance or division of land so held, it goes over to the survivors. On the argu-

ment it was contended that there was a severance between the sisters and their husbands by occupancy as there was a partition fence through the middle of the 100 acres; occupancy will not, in my opinion, be sufficient, for they were both seized *per my* and *per tout*. It is said there was a partition fence. This might have been made for the mutual convenience of both parties, or to show the equitable mode of occupancy, which by no means altered the nature of the estate. I do admit a partition may be made between the joint tenants by parol: so far, at least, that equity would quiet the heirs of either party in the enjoyment; as where both parties, in the presence of competent witnesses, actually agree to a partition and in pursuance of such agreement, either of them goes into possession of his part and makes valuable improvements. In such case equity would hold the other to his agreement and not suffer him to take advantage of the other's labors and improvements. 2 Vern. 233. But in this case no such partition was proved or even alleged. I am therefore of opinion, that on the death of Mrs. Honald, Mrs. Seastrunk took the whole estate by survivorship and no descent was cast upon David Honald, the plaintiff's lessee. It is the same in dower. If two be joint tenants and die leaving a widow, it will go to the survivor; and the widow shall not have her dower. Co. Litt. 30 a, 30 b; 3 Bacon, sec. 671. As to the hardship which has been so much insisted on, it is admitted, and the Primogeniture Act, as it is commonly called, has effectually provided against the recurrence of this evil in future. But this case happened before that Act was passed and must be determined on the principles of the common law, as it stood in 1786, in this State.

GRIMKE, J.—It has been contended, on the part of plaintiff, that our law is averse to the doctrine of joint tenancy; that it is no longer of force in this State; and that the severance of a joint estate has been provided for. But on examining the Act passed before the death of Mrs. Honald, it does not appear that the Act itself operates any severance, but only provides means of procuring a severance and preventing survivorship. By the Act of Assembly of 1734, a joint tenant was permitted to devise his estate: but here there is no will, and this Act can have no effect on the question. The next is the Act of Assembly of 1748, by which joint tenants, etc., were allowed to apply to the Court of Common Pleas for writs of partition; but the Act provides

no other mode of putting an end to joint tenancy and seems cautiously drawn, not to disturb the course of the common law. As to the Primogeniture Act, it can have no operation here, because Mrs. Honald died long before that Act was made.

Since, therefore, there is no will, no proof whatever of partition, agreeably to the Act of 1748, and the Primogeniture Act does not apply, it follows that Mrs. Seastrunk took the whole estate by survivorship, and nothing passed to the plaintiff, by the deed of David Honald.

Motion refused.

According to LITTLETON, as amended by Lord COKE, "joint tenants are as if a man be seized of certain lands or tenements, etc., and thereof enfeoffeth two, or three, or four, or more, to have and to hold to them and to their heirs, or leaseth to them for term of their lives, or for term of another's life, by force of which feoffment or lease they are seized, these are joint tenants," Littleton, Sect. 277, Co. Litt. 180 b. COKE remarks that there be also joint tenants by other conveyances than those mentioned by LITTLETON, as by fine, recovery, bargain and sale, release, confirmation, etc., and by other limitations than those mentioned, Co. Litt. 180 a. BLACKSTONE's definition of an estate in joint tenancy is "where lands or tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years, or at will," Blackst. Com., Lib. 2, p. 180; and KENT defines joint tenants as follows: "Persons who own lands by a joint title created expressly by one and the same deed or will," 4 Kent, Com. 358.

Creation of Estate—Unities.

An estate in joint tenancy can be created by purchase only and is distinguished by its possession of what are called the four unities, viz: those of interest, title, time, and possession, *De Witt v. City of San Francisco*, 2 Cal. 289, or, as BLACKSTONE puts it, "joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession," Blackst. Com., Lib. 2, p. 180. These unities are frequently spoken of as necessary to the existence of a joint tenancy, but the force of this expression must be somewhat qualified as will appear more fully below.

Unity of Interest.

The first unity, that of interest, has the effect of prohibiting a joint tenancy in which the estates of the tenants are unequal; thus there cannot be a joint tenancy in which one tenant holds for life and the other for years, Co. Litt. 188 a; or one in fee and the other for years. In *Wiscom's Case*, 2 Co. 60 b, however, it is held that an estate may be limited to three and the heirs of one, and that in such case the three will hold as joint tenants for life, with remainder in fee to the one whose heirs are mentioned, and there may be joint estates for life with several inheritances, Co. Litt. 182 b; but if there should be three tenants for life and one of them should afterwards acquire the fee, either by purchase or descent, the jointure would be severed, and the doctrine of a continuing jointure in spite of the limitation over of a remainder to the heirs of one of the joint tenants should, it seems, be confined in operation to cases in which the limitation to the heirs and the joint limitation are by one connected and undivided clause, for otherwise the rule that joint tenants must take by one and the same act of conveyance would be violated; and with this agrees the reason given by LITTLETON for upholding a joint estate for life with several inheritances: "And the cause why such donees in such case have a joint estate for term of their lives, is, for that at the beginning the lands were given to them two, which words without more saying will make a joint estate to them for the term of their lives," Litt. Sect. 283; Co. Litt. 182 b.

Another result of the rule requiring unity of interest in a joint tenancy is that a natural person cannot hold jointly with a corporation, Co. Litt. 190 a; *De Witt v. City of San Francisco*, 2 Cal. 289; nor can two corporations hold jointly with each other, Co. Litt. 190 a; and two persons cannot hold together; one in a political and the other in a private capacity; thus in England one cannot hold as joint tenant with the Crown, Id., and in this country one cannot hold as a joint tenant with the State.

Unity of Title.

The second unity, that of title, requires the estate to arise by one and the same act, whether legal or illegal, whether a deed, devise or disseizin, for, as joint tenancy cannot have its origin in a descent or by act of the law, if the tenants had titles arising by different acts, they would have different titles and one might be good and another bad, which would destroy the jointure, Blackst. Com., Lib. 2, p. 181.

Unity of Time.

To the rule that the third unity, that of time, is an essential ingredient of an estate in joint tenancy, there are exceptions, as Lord COKE says, after giving an instance of the failure of a joint tenancy for a want of this unity, to wit, a demise of lands for life with remainder to the right heirs of I. S. and I. N. where I. S. and I. N. both have issue and die at different times, "and yet in some cases there may be joint tenants and yet the estate may vest in them at different times," Co. Litt. 188 a.

Two of the exceptions are mentioned by COKE: *first*, if a man make a feoffment in fee to the use of himself and such wife as he shall afterwards marry for the term of their lives and, after, he taketh wife; *second*, if a disseizin is made to the use of two, and the one agree at one time and the other at another, Co. Litt. 188 a. As to the second exception, it may be remarked that there is a technical maintenance of the unity of time by way of relation, for the title of both tenants originated in the same act, to wit, the disseizin, to the time of which the assent, whenever given, would relate. The reason given by BLACKSTONE for upholding the joint tenancy in the first case is that the use of the wife's estate is in abeyance and dormant until the intermarriage, and being then awakened has relation back and takes effect from the original time of creation, Blackst. Com., Lib. 2, p. 182. Chief Baron GILBERT takes a different ground, and says: "The husband has no property in the land, neither *jus in re* nor *ad rem*, but the feoffee has the whole property, at first to the use of the husband only and upon the contingency of marriage to the use of them both entirely. And this is the only rule of equity to support the trust in the same manner the parties have limited it, and now it is executed in the same form as it was governed in equity," Gilb. Uses and Trusts, 71. This position would seem to be supported by HARGRAVES, note 13 to Co. Litt. 188 a. SUGDEN, however, in his note on Gilbert, considers it questionable whether the reason of the exception be not that the use results to the feoffor until marriage and that upon the marriage the use declared arises, so, that the husband and wife really take the use limited at the same time.

In effect it may be said that the requirement of the unity of time applies only to limitations at common law, and does not extend to conveyances under the statute of uses or to devises, Tudor, Lead. Cases, p. 882; *Sammes's Case*, 13 Co. 54; Fearne, Cont. Rem. 312, 313; and a joint tenancy may arise in the case of a limitation by way of use although the conveyance used is a common law conveyance, as a fine or a feoffment, 4 Kent, Com. 358, note d, and in a marriage settlement a good limitation may be made to the children of the marriage as joint tenants, although from

the nature of the case they cannot be expected to take at the same time, see *Stratton v. Best*, 2 Br. Ch. 233, in which case Lord THURLOW showed a decided inclination to disregard the distinction above noted; and in this country a conveyance to the wife of A. and her child begotten by him, has been held to give a joint estate to the wife and a child subsequently born, *Powell v. Powell*, 5 Bush, 619.

Unity of Possession.

The fourth unity is that of possession, by reason of which each joint tenant is said to be seized *per my et per tout*, and so to have the possession of each and every part and parcel of the whole, as said by LITTLETON, in defining the force of the expression *per my et per tout*: "This is as much as to say, as he is seized by every parcel and by the whole, and this is true, for in every parcel and by every parcel and by all the lands and tenements he is jointly seized with his companions." Sect. 218. *Thornton v. Thornton*, 3 Rand. 179.

Right of Survivorship.

The most striking distinction, and perhaps the most important quality of the estate in joint tenancy, is the right of survivorship, *jus accrescendi*, which springs from the unities of possession and title and by force of which, on the death of one joint tenant, his estate, if a freehold, will not pass to his heirs, or, if a chattel real, to his executors, but will be merged in and swallowed up by that of the remaining joint tenants, Litt. Sects. 280, 281; *Spencer v. Austin*, 38 Vt. 258; *Executors of Herbeumont v. Thomas et ux.*, 1 Cheves (2d part), 21; *Overton v. Lacy*, 6 T. B. Mon. 13.

No Dower or Curtesy in an Estate in Joint Tenancy.

As a consequence of the *jus accrescendi* the widow of a joint tenant cannot have dower in the joint estate, *Caines et al. v. The Lessee of Grant*, 5 Binn. 119, opinion of BRACKENRIDGE, J.; *Mayburry v. Brien*, 15 Pet. 21; *Babbitt v. Day*, 41 N. J. Eq. 392. The rule formerly went so far as to declare that if a joint tenant aliened his share yet his wife should not be endowed, although the possibility of the other tenant taking by survivorship was destroyed by the severance of the jointure, for the husband was never sole seized, Co. Litt. 31 b; Fitzherbert's N. B. 150 k; 4 Kent, Com. 37. The tendency of more modern times, however, is to the opinion that the dower is ousted, in a case of joint tenancy, only because the prior

right of survivorship has attached and cannot be upheld consistently with that of allowance of dower, and not for the technical reason arising out of the character of the seizin; and hence it is held in States where the *jus accrescendi* has been abolished, as in North Carolina, Kentucky, and Indiana, that the widow may have dower of her husband's share, *Weir v. Humphries*, 4 Ired. Eq. 264; *Davis v. Logan*, 9 Dana, 186; *McMahan v. Kimball*, 3 Blackf. 13, note.

As there cannot be dower, so neither can there be, at common law, courtesy of an estate in joint tenancy, Co. Litt. 30 a, 183 a, 37 b; Littleton, Sect. 45.

***Jus Accrescendi* Superior to Right to Devise.**

At common law, the joint tenant could not devise his estate, for the right of survivorship left him nothing which could pass after his death, *Duncan v. Forrer*, 6 Binn. 193; *Nichols v. Denny*, 37 Miss. 59. The same rule prevailed under the Wills Act of Pennsylvania of 1705, *Duncan v. Forrer*, *supra*.

Effect of Charge by Joint Tenant.

A rent charge granted by a joint tenant will not bind the survivor, for the maxim is *jus accrescendi præfertur oneribus*, Litt. Sect. 286; Tudor's Lead. Cas. 884; 4 Kent, 360; but it is held that a lease made by a joint tenant will be binding upon the survivor, *Whitlock v. Huntwell*, 2 Roll. Abr. 89; Co. Litt. 185 a; and LITTLETON, Sect. 289, thus gives the reason for the diversity in the two cases: "For in the grant of a rent charge by a joint tenant the tenements remain always as they were before, without this that any hath any right to have any parcel of the tenements, but they themselves and the tenements are in the same plight as they were before the charge, etc. But where a lease is made by a joint tenant to another for term of years yet presently by force of the lease, the lessee hath right on the same land (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his term."

Statutory Abolition of Right of Survivorship.

The right of survivorship has been abolished by statute in several of the United States. Alabama Code (1876), Tit. 3, Ch. 1, Art. V., § 2191, p. 573; Colorado Gen. Laws (1883), § 1832, p. 591; Florida, McClell. Dig. (1881), Ch. 92, § 11, p. 471; Illinois, R. S. (1883, Hurd), Ch. 76, § 1, p. 620; Kentucky Gen. Laws (Bul. & Fel. 1881), Ch. 63, § 13, p. 586;

Mississippi Hutch. Dig. 614, § 12; see *Nichols v. Denny*, 37 Miss. 59; North Carolina, Act 1784, Code (1883), § 1326, p. 529; see *infra*, Pennsylvania, Act Mar. 31, 1812, Purd. Dig. 939, pl. 1; South Carolina, Act of 1791, Gen. St. (1882), Pt. 2, Tit. 2, Ch. 60, p. 543; Tennessee, Code (1884, M. & V.), Ch. 2, Art. 1, § 2817, p. 500; Texas, Act March 18, 1848, R. S. (1879), Tit. 33, Art. 1655, p. 248; Virginia, Act 1786, Code (1860), Ch. 116, § 18; West Virginia, Amended Code (Warth, 1884), Ch. 71, § 18, p. 549 (but the right is expressly saved where an intent to give a survivorship appears in the creation of the estate, *Id.* § 19, p. 550); and in Georgia the right has been held to have been abolished by the 51st Article of the Constitution of 1777. "Estates shall not be entailed; and where a person dies intestate, his or her estate shall be divided equally amongst his or her children; the widow shall have a child's share or her dower, at her option," the Court being of opinion that a joint tenant came within the meaning of the term "person," *Lowe v. Brooks*, 23 Ga. 325.

In New Jersey the right of survivorship has very recently been decided to be in force, *Babbitt v. Day*, 41 N. J. Eq. 392.

In North Carolina it was, in a recent case, contended that the Act of 1784 abolished altogether the *jus accrescendi* in joint estates and that survivorship was no longer recognized by the law, but the Court held that the Act did not abolish joint tenancies but only took away from such estates held in fee the right of survivorship and had no application to joint estates for life, *Rowland v. Rowland*, 93 N. C. 214, and see *Vass v. Freeman*, 3 Jones Eq. 227; *Powell v. Allen*, 75 N. C. 450.

The mere abolition of the right of survivorship in joint tenancy will not prevent a limitation over to the survivor of two grantees or devisees taking effect when it is the intent of the grantor or devisor that such shall be the case. In discussing the effect of the Pennsylvania Act, KNOX, J., in *Arnold v. Jack's Executors*, 24 Pa. St. 57; S. C. 1 Grant, 405, said: "It is a question worthy of consideration whether the provisions of the Act of 1812 apply to a joint tenancy created by express words in a devise, or whether the operation should not be confined to those technical joint tenancies arising from the unities 'of time, title, interest, and possession,' but conceding that the right of survivorship as an incident of joint tenancy, no matter how created, is gone, it by no means follows that this right may not be expressly given by a devise in a will or by a grant in a deed of conveyance. It may cease to exist as an incident and yet be legally created as a principal." In the case cited the devise was to three persons named "as joint tenants, and to the survivors or survivor of them, and the heirs of said survivor, to be assignable by my said heirs or their sur-

vivors at any time or in any manner they may think proper, provided the said heirs, or their survivors, shall all, or both if one be dead, assent to such assignment, but the survivor of them may assign, convey, or devise at his pleasure." It was held that the right of survivorship existed. This decision seems in accord with the spirit of law and consonant to justice. If it be objected that its effect is to render it possible by simply reciting, in a deed or will, the constituents and incidents of a joint tenancy to maintain the right of survivorship between joint tenants as effectually as though the statute abolishing the *jus accrescendi* had never been passed, and so to nullify the statute, the reply is that the object of the statute was not to prevent a grantor or devisor granting or devising such an estate and to such persons or person as he pleased, but to do away with and prevent the injustice and hardship which was often unwittingly worked by the use of technical words, as said by HARE, J., in *Lentz v. Lentz*, 2 Phila. 117, "the object of the Act was to cut off survivorship by operation of law aside from or contrary to the meaning of a donor, and not to restrain or preclude any direction which he may think fit to impress on the transmissal of his property within the limits prescribed by the law of perpetuities."

Estate in Joint Tenancy held non existent in Ohio.

In Ohio, however, it has been held that a devise to three persons and to the survivor or survivors in trust, to hold as joint tenants and not as tenants in common, will not create an estate in joint tenancy, *Lessee of Miles v. Fisher et al.*, 10 Oh. 1; but it must be borne in mind that it is held in that State that the estate in joint tenancy has never existed in Ohio, *Sergeant v. Steinberger*, 2 Oh. 307. The absolute denial of the existence of joint tenancy and of the doctrine of survivorship has in at least one case driven the Supreme Court of Ohio to great lengths in order to carry out the wishes of a grantor without openly violating the rule of the Ohio decisions. In the case alluded to, *Lewis v. Baldwin*, 11 Oh. 352, a deed was made by Charles R. Baldwin and Mary Jane his wife, conveying land of the wife to a trustee, who in accordance with the original intention of the grantor, immediately reconveyed the same to Baldwin and wife, "to them jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns." A bill was filed to set aside the deeds, and in the course of the opinion of the court interpreting the latter deed, BIRCHARD, J., said: "Complainants contend that this makes them tenants in common with Baldwin, because otherwise the deed would be considered as creating a joint tenancy. But the respondent, Baldwin, has a fee by

the terms of the grant, which was to him as survivor and to his heirs and assigns. The deed gave a joint estate to the husband and wife, during their lives, and a grant over to him as survivor of the entire estate."

While this decision undoubtedly satisfies all the requirements of justice yet it is plain to see that it is really the upholding either of a joint tenancy or of an estate by the entireties and, hence, inconsistent with the line of Ohio authority, which is as inimical to the estate by entireties as to that in joint tenancy, see *Sergeant et ux. v. Steinberger*, 2 Oh. 305; *Wilson v. Fleming*, 13 Oh. 68.

So far indeed has the policy of the law in Ohio been adverse to survivorship, that in *Shaw et al. v. Hoard et al.*, 18 Oh. St. 227, where a devise ran as follows: "I give unto my said wife and daughter all the real estate to each one-half. . . . On the decease of either . . . then the survivor shall have all the property . . . and if both die without leaving any heir of their body . . . to my wife's brother," and the daughter survived the wife, it was held, that a child of the wife by a second husband could take, although the daughter had, after her mother's death, entered upon and occupied the premises until her own death, DAY, C. J., saying, "It would seem that it was the plain intent of the testator as reflected by the will to provide first of all for his widow and child during their lives, and then to secure his property after their decease to their issue, and in default of such issue to substitute his own devisee for the statutory heirs." The learned Judge seems to have attributed to the testator a solicitude for his wife's progeny by another husband which is at least unusual.

Doctrine of Survivorship non existent in Connecticut.

In Connecticut the doctrine of survivorship does not seem to have existed, such at least is the case since 1769, when the case of *Phelps v. Jepson*, 1 Root, 48, was decided. No opinion is given in the report of the case, but the reporter, Mr. Justice Root, says in a note, "By this decision the doctrine of survivorship between joint tenants was exploded and determined not to be the law of this State, which settled the law as to this point, and has never since to my knowledge been contradicted or shaken."

Interpretation of Devise or Grant—Favor shown at Common Law to that Interpretation which would make a Joint Tenancy rather than a Tenancy in Common.

The common law, for feudal reasons which were opposed to the division of tenures, as between a joint tenancy and a tenancy in common favored

the estate by joint tenancy, *Martin v. Smith*, 5 Binn., 16; *Caines v. Lessee of Grant*, Id. 119; and, consequently, in doubtful cases where a grant or devise required construction the tendency of the courts of law was towards declaring the estate granted a joint tenancy, but with the abolition of tenures by the Statute 12 Car. II. c. 24, the reason, and, therefore, the policy of the law ceased, and, as said by TILGHMAN, C. J., the "courts of law now incline against them [*i. e.*, joint tenancies] as much as is done in equity. They are a kind of estates that do not make provision for posterity. Chancery will decree in favor of a tenancy in common as much as it can. If, indeed, there are no words that will point out a tenancy in common, the rule of survivorship in a joint devise must take place; but a joint tenancy will never be inferred where a testator meant division."

Creation of Estate—Grant or Devise to two or more Persons without Words of Severance.

The general rule was, and technically may be said still to be except where abrogated or altered by statute, that by a grant of an estate to two or more persons, except in the case of husband and wife, without the addition of words of severance, an estate in joint tenancy is created, whether the estate granted be in fee, for life, *per autre vie* or for years, *Barclay v. Hendrick's Heirs*, 3 Dana, 378. The introduction of an estate to the survivor, after a joint grant in fee, will not alter the character of the estate taken, this was decided in Pennsylvania, in 1798, in *The Lessee of Davidson v. Heydon*, 2 Yeates, 459; in that case the proprietaries had granted certain land to Bernard Dougherty and Mary Kinkade, *habendum* to them, their heirs and assigns, and to the heirs and assigns of the survivor of them, forever." Notwithstanding the argument of Mr. Hamilton, that the deed created a life estate in each grantee with a remainder to the survivor, the court held that the estate granted was one in joint tenancy, YEATES, J., applying the maxim, "*expressio eorum quæ tacite insunt nihil operatur*," and saying, "We need not on this occasion recur to feudal principles for the solution of the question. In fact the superadded words mean no more than the law would imply without them." But in New Jersey, a devise to three and "to the survivor of them and to the heirs and assigns of such survivor," has been held to be a joint estate for life, with a contingent remainder in fee to the survivor, *Hannon v. Christopher*, 34 N. J. Eq. 459.

A governmental grant made simply to two or more without expressing any contrary intent is held to create a joint estate, and the nature of the estate is fixed by the patent issued, irrespective of the dealing by the

tenants with the lands prior to the issue of the patent, or of any agreement between them as to a division to be made amongst themselves when the title shall have been acquired, *Jones v. Jones*, 1 Call, 458; *Lacy v. Overton*, 2 A. K. Mar. 440; *Overton v. Lacy*, 6 T. B. Mon. 13; and in *Young v. De Bruhl*, 11 Rich. (S. C.) 638. This was held in a case where the same piece of ground was covered by two patents, issued to different people for different lots, on the same date, and the surveys of which were recorded on the same day, and purported to be on warrants issued on the same day. WITHERS, J., said: "If one instrument had issued granting the land to both, they would have been joint tenants as at common law without dispute. But are there not all the unities which make that estate in the sense of the common law in this instance? There is unity of time, of interest, of title (although by two several instruments from the same grantor issuing *uno flatu* so far as we know), and of possession."

In Massachusetts the law has been held otherwise; there, in 1809, the Supreme Judicial Court passed on the effect of a legislative grant to eight persons by name, and held itself, on account of the long-continued system of granting lands in large parcels to a great number of grantees, "bound to decide as a rule of property not to be disturbed, that grants by virtue of acts or resolutions of the Legislature to two or more persons in fee are to be construed as conveying to the grantees estates in common, unless a different tenure should be expressed in the grant."

Ordinarily a devise to two or more *simpliciter* will give an estate in joint tenancy, *Kennedy's Appeal*, 60 Pa. St. 511; *Campbell v. Heron*, 1 Tayl. 199; *Haughabaugh v. Honald*, 1 Treadw. 90; *Ball v. Deas*, 2 Stroh. Eq. 24.

Statutory Interference with Common Law Policy as to Estates in Joint Tenancy.

The policy of the law has in this country, however, set so strongly against estates by joint tenancy, that in some States Acts have been passed abolishing joint tenancy altogether and turning estates, which at common law would have been in joint tenancy, into estates in common, Colorado, Gen. Laws (1883), § 1832, p. 591; Georgia, Code (1882), Pt. 2 Tit. v. Ch. vii., § 2300, p. 564; Oregon, Gen. Laws (1872), Miscell. Laws, Ch. 17, § 38, p. 589; in other States the effect of this policy has been to cause the passage of Acts providing that certain expressions, which prior to the passage of said Acts would have been held to create joint tenancies, shall be taken to create tenancies in common, unless a contrary intent appear in the deed or will granting or devising the estate. Some of these Acts require the contrary intent to be declared in express terms

on the face of the instruments, while others allow a joint tenancy to be created if the intent appear from the general structure of the instrument. Such Acts have been passed in Arkansas, R. S. (1874), Ch. 29, § 837, p. 271; California, Civil Code, § 5685, p. 678; Colorado, Gen. Laws (1883), p. 171; Delaware, Code (1874), Ch. 86, § 1, p. 527; Illinois, Rev. St. (1883), Ch. 30, § 5, p. 279; Indiana, Rev. St. (1881), Ch. 18, § 2922, p. 581; Iowa, Rev. Code (1884), Tit. xiii., Ch. 5, § 1939, p. 526; Maine, Rev. St. (1883), Tit. vii., Ch. 73, § 7, p. 604; Maryland, Rev. Code (1878), Art. 45, § 3, p. 397 (see *Purdy v. Purdy*, 3 Md. Ch. 547); Massachusetts, Pub. St., Ch. 126, §§ 5, 6, p. 744, as amended by Act 1885, Ch. 237, §§ 1, 2, p. 679; Michigan, Howell's Am'd St. (1882), Tit. xxii., Ch. 213, § 5560, p. 1445; Minnesota, Stats. (1878), Ch. 45, § 44, p. 564; Mississippi, Rev. Code (1880), Ch. 44, § 1197, p. 346; Missouri, Rev. St. (1879), Ch. 69, § 3949, p. 676; New Hampshire, Gen. Laws (1878), Ch. 135, § 14, p. 325; New Jersey, Act of 1812, Rev. St. p. 167, pl. 78; New York, Rev. Stat. (Throop, 1882), Pt. 2, Ch. 1, Tit. 2, Art. 1, § 44, p. 2179; Oregon, Gen. Laws (1872), Miscell. Laws, Ch. 6, § 9, p. 516; Rhode Island, Pub. Stat. (1882), Ch. 172, § 1, p. 441; Wisconsin, Rev. St. (1878), Ch. 95, § 2068, p. 617; Vermont, Rev. Laws (1880), Ch. 96, § 1917, p. 396.

These Acts in general, though with some variation of phraseology, provide that when a deed, conveyance, or devise is made to two or more persons, the devisees or grantees shall not take as joint tenants, or shall take as tenants in common, unless it is expressly declared in the conveyance that the estate is granted in joint tenancy; see statutes of Arkansas, Colorado, New Jersey, Maryland, Michigan, Minnesota, New York, Illinois, Delaware (in New Jersey, Illinois, and Delaware to prevent the implication of an estate in common an express declaration is required that the estate is not granted, or that the grantees or devisees are *not* to hold, in common); or unless a contrary intent (*i. e.*, contrary to the presumption of intent to create an estate in common) appear; see statute of Iowa; or it is either expressly declared in the instrument creating the estate, or the intention of the grantor manifestly appear therefrom, that the estate shall be taken in joint tenancy; see statutes of Indiana, Mississippi, New Hampshire, Rhode Island, and Vermont.

The California statute has a form of expression peculiar to itself: "Every interest acquired by several in their own right is an interest in common, unless acquired for partnership purposes or declared in its creation to be a joint interest, or unless acquired as community property."

It becomes of importance sometimes to consider how far statutes of the class above mentioned have a retrospective effect; whether such a statute

will affect estates in joint tenancy vested at the time of its passage, or affect instruments drawn before that time, or whether its effect will be confined to the interpretation of instruments executed after such time. In this question is involved frequently not only the meaning but the constitutionality of the Act. The Massachusetts Act of 1785 was, in *Miller v. Miller*, 16 Mass. 59, held constitutional, although its retrospective character was pressed upon the court and admitted by it, on the ground that the change was a beneficial one. PARKER, C. J., saying: "The statute in its terms applies to estates created before, as well as after, its enactment. The principle is nevertheless correct that the Legislature cannot impair the title to estates without the consent of the proprietor, unless for public objects, when an adequate consideration shall be provided. But there can be no objection to the operation of any legislation acting retrospectively which shall enlarge or otherwise make more valuable the title of any estate; for the consent of the holder may always be presumed to such acts. Now it was clearly for the interest of both the grantees in the deed under consideration that they should hold as tenants in common rather than as joint tenants; inasmuch as a certain inheritance in a moiety is more valuable than an uncertain right of succession to the whole, and in this view the objection to the operation of the statute we think is avoided. In the case of *Holbrook v. Finney*, 4 Mass. 568, it is said by Chief Justice PARSONS that 'there seems to be no constitutional objection to the power of the Legislature to alter a tenure by substituting another tenure more beneficial to the tenant.'" And see *Annable v. Patch*, 3 Pick. 360. In New Hampshire, in *Miller v. Dennett*, 6 N. H. 109, the question being the effect of the Act of 1809 upon a vested joint tenancy, and the constitutional prohibition of a retrospective law and the provisions of the Constitution of the United States with reference to the impairment of a contract being brought to the attention of the bench, the court upheld the Act and its effect, upon a different ground from that taken in Massachusetts. RICHARDSON, C. J., in delivering the opinion of the court, said: "Is then the statute of 1809, in relation to the deed in this case, a retrospective law for the decision of civil causes within the meaning of the Constitution? We think it is not. In changing joint tenancies created by deeds then existing into tenancies in common it furnished no new rule to govern the decision of any action then pending or of any cause of action. The statute applied to the deed in this case would take away no vested right. Neither John nor William had any vested interest in the moiety of the other. The acquisition of the whole estate by survivorship would have been in either nothing more than a hope or expectation, like the expectation of a child to inherit the estate of a parent. The

statute thus applied operates upon an existing estate but not retrospectively within the meaning of the Constitution. It can no more be considered a retrospective law than a statute altering the descent of intestate estates. It neither gives nor takes away any right or interest. The application of the statute to a case where one joint tenant had actually taken the land by survivorship at the time the statute was passed, and which is a case excepted from the operation of the statute, would be an instance of the very thing which the Constitution intended to prohibit. Thus applied it would take away a vested right, make a new rule for the decision of existing cases, and would be in its nature an exercise of judicial power. But it is further said that this statute applied to the deed in this case is a law impairing the obligation of a contract within the meaning of the Constitution of the United States. We do not perceive this. The statute only changes a joint tenancy into a tenancy in common. The contract which created the estate is not altered or impaired. The deed conveyed an estate in joint tenancy, and that estate must be considered as remaining until the statute of 1809 changed it into a tenancy in common. Such a change did not impair the obligation of any contract in the deed, but merely made the grantees tenants in common from the time the statute took effect."

In Pennsylvania, in *Bambaugh v. Bambaugh*, 11 S. & R. 191, a case which, while it invited, did not imperatively call for the decision of the question, the Supreme Court held that the Act of 1812 was both retrospective and constitutional, TILGHMAN, C. J., saying: "There is no force in the argument that the operation of the Act on existing estates was an invasion of vested rights. Who should be the survivor was in contingency, and in the mean time either joint tenant might have severed the estate by legal means without the consent of his companion. The Act of Assembly did for them at once and without expense what ninety-nine in a hundred wished to be done; but if there were any joint tenants who desired the chance of survivorship they might have it by an agreement for that purpose. Now, should we undertake to put a limitation on the plain words of the Act we might do an irreparable injury to many, who, reading the words as they are written, have supposed a partition unnecessary, and, therefore, have died without effecting it. Some thing was said in the argument of this cause against the constitutional power of the Legislature to pass an Act affecting estates *then in existence*; but on this point we have no doubt. The Act deprived no man of his property, where a title had already accrued by survivorship, it remained untouched; the only effect of the law was to place the parties on an equal and sure footing, leaving nothing to chance; without depriving them, however, of

the right of making any agreement between themselves which they might think proper. In such a law there is nothing like an invasion of the rights of property nor anything which is forbidden by the Constitution of the Commonwealth."

Notwithstanding the high character of the courts by which the above decisions were made, it seems that the Judges were led by a wish to sustain the assumed desire of joint tenants, when they gave to the Acts in question a retrospective effect. That a vested right is destroyed is plain ; it does not do to waive the fact away by saying the survivorship is a contingency ; the right to the whole estate on survivorship is no more a contingency than is a vested remainder for life, its enjoyment may never come, but the right is vested and has its value ; nor does it do to say that the Act renders the tenure more beneficial, the estate more valuable, for the fact is to be remembered that if it does assure to one co-tenant one-half of the estate, the Act takes from the other the half which he, unless prevented by a severance, would have acquired ; again, the Act certainly, if taken retrospectively, compels persons holding at the time of its passage, and desiring to continue to hold in joint tenancy, to resort to extraordinary means to preserve that tenancy.

Opposed to these decisions we have the courts of New Jersey and California. In the first-named State the Act of February 4, 1812, came before the Supreme Court in 1837 in the case of *Den ex d. Berdan v. Van Riper*, 16 N. J. Law, 7, and was very learnedly discussed by that court in an opinion delivered by HORNBLOWER, C. J. Two questions were considered : first, was the Act, if retrospective, unconstitutional as impairing the obligation of a contract ; second, was the court compelled to give to the Act a retrospective force. Upon the first, after quoting *Green v. Biddle*, 8 Wheat. 84, the Chief Justice said : "I think it may be safely added, that any law which changes the influence and legal effect of an existing contract as between the original parties thereto, or as between parties claiming under it, giving to one a greater and to the other a less interest or benefit in the subject matter of the contract than by its terms or its legal operation they would be entitled to, is a law 'impairing' its 'obligation' within the meaning of the Constitution. Apply these principles to the case before us, and if the Act in question is retrospective, it seems to me to be directly in conflict with that provision in our national charter which prohibits any legislative violation of contract.

"The rights of the parties in this suit depend upon a *contract* made and entered into prior to the year 1812. . . . When the deed was made in 1804, the terms in which it was written created a joint tenancy just as distinctly and strictly as a deed now made expressly declaring the inten-

tion of the grantor to make such an estate would do it. . . . If one joint tenant was aged and infirm and the other had youth and health on his side, he had a vested right in the chance of survivorship, and the beneficial interest incident to such an event; a right that could only be defeated by his own act or by the act of his co-tenant in his lifetime. The probability of surviving the other tenant may have been the money consideration with the defendant, Van Riper, for becoming a joint purchaser, or with the donor for making a joint conveyance.

"The defendant in this case has survived his joint tenant, and he claims the benefit of his contract; he sets up a title to the whole of the premises by the very terms of that contract; and how does the plaintiff answer this claim? Not by denying the defendant's title under the deed, the written contract of the parties, but by asserting that the Legislature has passed an Act altering the force and effect of the deed, changing the rights of the parties under it, and converting what was an estate in joint tenancy into another and different estate. He admits that under the deed the defendant has title to the whole, but insists that in virtue of the statute he has title to but one moiety of the premises. Which shall prevail? The deed or the statute; the contract of the parties or the authority of the Legislature? The Constitution of the United States or the enactments of our General Assembly?

"The learned counsel for the plaintiff considered this a remedial statute, and urged upon us that remedial and mitigating statutes might be retrospective and yet valid. This is cheerfully conceded in all cases where such remedy or mitigation is not in violation of existing contracts. But if the deed under which the defendant claims is not a contract within the meaning of the Constitution of the United States I do not know what is. Again, it was contended that as either of the grantees might, by his own act, have severed the joint tenancy; and as the Legislature might provide for and even enable one joint tenant to compel the other into a partition without any infraction of constitutional law; therefore, they might with the same propriety effect a severance of the estate at once by a positive enactment. But I do not think so, I may cancel my bond and release my debtor from its obligation; but the Legislature cannot, therefore, declare it null and void; or good only for half the amount due upon it. So the Legislature may by statutory regulations enable one partner to compel his associate in trade to settle up the concern and put an end to the copartnership; but it cannot alter the terms of the partnership or change the rights and interests of the parties in the assets of the firm."

After considering the argument drawn from statutes abolishing estates tail, and regarding them as based upon public grounds, his Honor thus con-

cluded the opinion, as to the first question : " Whether men are joint tenants or tenants in common is a matter of total indifference to the public, and therefore any statute changing an estate of joint tenancy, created by the parties, into a tenancy in common, or the latter into the former, is as much a statute impairing the obligation of contracts, as a law would be that should release my obligor from the payment of his bond ; I am therefore of opinion that the Act in question, if retrospective in its terms, is, so far as it is retrospective, inoperative and void." Upon the second question the court held that the terms of the Act were not necessarily retrospective and, therefore, held the Act prospective only, the Chief Justice saying in conclusion : " I cannot refrain from adding one other consideration peculiar to this case that inclines me strongly to resist the plaintiff's construction. If that be correct then those who have taken conveyances prior to 1812 in the common law form are not now and cannot be joint tenants, though it was always their intention to be such and may be their desire to remain so. They can have no election ; while those who have taken conveyances since 1812, and those who may hereafter purchase, may, by conforming to the statute, become joint tenants and continue such if they choose to do so. Nothing less than a plain unequivocal enactment, if there was no other difficulty in the case, would in my opinion justify the court in adopting a construction so unreasonable, not to say unjust."

In California the Act of 1855, which declared a conveyance to two or more a tenancy in common, unless declared to be a joint tenancy, was, in *Greer v. Blanchard*, 40 Cal. 194, held to be not retrospective, the court saying : " If such were the intention, the Legislature had not competent authority to give such effect to the statute as would deprive joint tenants of one of the essential elements of their tenure, the right of survivorship."

The Act of Colorado is expressly declared to be prospective only.

Acts abolishing joint tenancy, or providing that it shall arise only by force of certain expression may be said, as a rule, not to apply to estates granted or devised in trust, or to estates held by executors, *Webster v. Vandeventer*, 6 Gray, 428; *Philadelphia and Reading R. R. Co. v. Lehigh Navigation Co.*, 36 Pa. St. 204 (see, *contra*, *Robison v. Codman*, 1 Sumn. 121, which is, however, not a decision of a court of last resort), and such estates are expressly excepted from their operation by statute in Missouri, Vermont, Mississippi, New York, Illinois, *supra*, Indiana, Rev. St. (1881), Ch. 18, § 2923, p. 582; Maine, Rev. St. (1883), Ch. 73, § 13, p. 605; Minnesota Stat. (1878), Ch. 45, § 45, p. 564; Michigan, Howell's Annot. Stat. (1882), Tit. xxii., Ch. 213, § 5561, p. 1445; Wisconsin, Rev. St. (1878), Ch. 95, § 2069, p. 617; New Jersey, Rev. St. p. 1224, pl. 1; North Carolina, Code (1883), Ch. 31, § 1326, p. 529.

In Rhode Island, in a recent case in which the question was debated, the court said that it was unnecessary to decide whether Pub. St. c. 172, § 2, applied to trusts, because it thought that an intent to create a joint estate was discoverable in the deed under consideration, but in delivering the opinion DURFEE, C. J., said, "Slighter indications will suffice in a trust deed than in other deeds to amount to a 'manifest showing,' because the courts are inclined to hold that trustees are joint tenants, on account of the inconvenience resulting from their holding as tenants in common," *Franklin Institution for Savings v. The People's Saving Bank*, 14 R. S. 632.

A deed to two or more containing a provision that the grantees shall pay the debts of the grantor does not raise such a trust as will come within the exception of the statute, *Lamb v. Clark*, 29 Vt. 273; but a conveyance in mortgage to two to secure a joint debt will make a joint tenancy, *Appleton v. Boyd*, 7 Mass. 131; *Goodwin v. Richardson*, 11 Id. 469.

In New Jersey the Act of 1812 was held to include trusts, and this was the law of that State until it was changed by the Act of April 1, 1868, *Boston Franklinite Co. v. Condit et al.*, 19 N. J. Eq. 394.

Acts of the character we are at present considering do not as a rule affect the estate by entireties held by husband and wife, for it is not an estate in joint tenancy, although sometimes spoken of as such, *Den ex d. Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42; *Wood v. Warner*, 15 N. J. Eq. 81; *Craft v. Wilcox*, 4 Gill, 504; *Rogers v. Benson*, 5 Johns. Ch. 437; *Wright v. Saddler*, 20 N. Y. 320; *Doner v. Doner*, 56 Pa. St. 106; *Thornton v. Thornton*, 3 Rand. 179; and it is expressly, if needlessly, excepted from their operation by the statutes of Missouri, Indiana, Minnesota, and Wisconsin; but it is expressly made subject to the statutory operation in Rhode Island, *supra*, Massachusetts, Act 1885, Ch. 237, §§ 1, 2, p. 679; West Virginia, Am'd Code (Warth, 1884), Ch. 71, § 18, p. 549; and Kentucky Gen. St. (1881), Ch. 52, § 13, p. 531; and in Iowa the terms of the Act are held to cover the estate by entireties, *Hoffman v. Stigers*, 28 Iowa, 302.

The Acts do not apply to estates tortiously acquired, as by disseizin, see *Putney v. Dresser*, 2 Metc. 583, and therefore, since their passage as well as before, if two or more jointly disseize one they will become joint tenants, *Id.*

The effect of the Acts under consideration, including those which destroy the incident of survivorship, is in all cases where interpretation of a deed or devise becomes necessary, to change the presumption from one in favor of the creation of an estate in joint tenancy to one against such creation, and to require that evidence be discovered in the instrument construed that

the testator or grantor intended that survivorship should exist, before such right will be recognized. See *Butler v. Butler*, 2 Mackey, 96.

Thus in Pennsylvania a devise (made since 1812) to three *nominatim* "to them and their heirs" has been held to give an estate in common, and as a result where the devise was revoked as to one of the three and another died before the testator, the third devisee took but one-third of the subject of the devise, *Beeson v. Miller*, 15 Pitts. L. J. 187, while had the estate been a joint one, the survivor in such case would have taken all, *Ball v. Deas*, 2 Strobb. Eq. 24; and in *Seely v. Seely*, 44 Pa. St. 434, a devise to two during their natural lives "and after their decease to the heirs (if any they have), and if they die without heirs then the above land shall fall to my heirs," was held a devise in tail in common, and see *Kennedy's Appeal*, 60 Pa. St. 511; and in *McVey v. Latta*, 4 W. N. C. 524, a devise to two "jointly and equally" was held not to make an estate in joint tenancy, although it was followed by the expression "or if one should die the survivor to hold the property in full," the death intended being held by the court to mean death in the lifetime of the testator. So in Massachusetts since the statute of 1785, a devise to two sons by name "on condition neither shall make any claim against my estate" has been held to give an estate in common, *Sackett v. Mallory*, 1 Metc. 355, and the words "jointly and severally" have been decided not to manifest an intent that the donees should take a joint estate, *Miller v. Miller*, 16 Mass. 59. In North Carolina a devise to three "to be kept together as joint stock until one should reach twenty-one and then to be equally divided" has been held not to give an estate in joint tenancy, *Weir v. Humphries*, 4 Ired. Eq. 264.

But a devise to two by name so long as they shall remain single, with a devise over on their marriage or death, will give a joint estate for life, *Lentz v. Lentz*, 2 Phila. 117, and so a devise to two "to have during their lifetime, at their death to have the privilege to will to my daughter Sarah Kerr's children, or my son Thomas Vetner's children, just as they see proper," has been held to give a joint estate for life, *Kerr v. Vetner*, 66 Pa. St. 326, and in a very recent case, *Jones v. Cable*, 19 W. N. C. 36 (decided January 3, 1887), a devise to two "as long as they do live and after their death to their children," was held to give a joint life estate with remainder to the children.

In Kentucky it is held that while the Act of 1796 abolished the right of survivorship in joint tenancy, yet tenants in common may by deed vest each other with the right of survivorship, but they cannot make themselves joint tenants so as to bar the right of partition even if they expressly intend to do so, *Truesdell v. White*, 13 Bush, 616.

Character of Seizin of Joint Tenants—Actions by Joint Tenants.

As we have seen, *supra*, joint tenants are said to be seized *per my et per tout*, which expression has been explained as meaning that for purposes of tenure and survivorship each tenant is possessed of the whole, but for purposes of alienation of his proportion only, 1 Prest. Est. p. 136; 4 Kent, 360, note a; Ram, Outlines of Tenure, 149, 150, 151; and see Blackst. Com., Lib. 2, p. 182. It results from this character of the seizin that if a joint tenant make a lease reserving rent to himself it will enure to the benefit of his joint tenant, Blackst. Com., Lib. 2, p. 182; if a release be made to one it enures to the benefit of all, Litt. Sec. 307; *Weaver v. Wible*, 25 Pa. St. 270; when joint tenants desire to recover land they must sue jointly, *Demey v. Lambier*, 7 Cal. 347, but it has been held that one joint tenant may, in such case, use the names of all, and that if some joint tenants disclaim the rest may still pursue the action in the joint names, the disclaimants having, by their disclaimer filed of record, sufficiently protected themselves against the consequences of an unsuccessful suit, *Eichelberger v. Eichelberger*, 4 Clark, 73, and it has even been held in a case of forcible entry and detainer that joint tenants might sue alone, *Rabey v. Fyler*, 10 Sm. & Mar. 440, in which case the court said: "The deed made them as trustees, joint tenants of the property. The possession of one was the possession of both. Hence, a recovery in this form of action would enure to the benefit of both. The deed is not the foundation of the action, but it is mere evidence of the right of possession, title not being involved in the controversy."

By statute in California a joint tenant or any number of joint tenants less than all may jointly or severally commence or defend any civil action or proceeding necessary for the enforcement or protection of the rights of such tenants, Civil Code § 10384, p. 959. In Michigan, Howell's Annot. Stat. (1882), Tit. 31, Ch. 274, § 7974, p. 1978, Illinois, R. S. (1883, Hurd), Ch. 45, § 5, p. 496, and Wisconsin, R. S. (1878), Ch. 138, § 3192, p. 824, joint tenants may bring joint or several actions for their shares or interests in the joint property. In Connecticut a joint tenant may maintain an action on account of the joint property in his own name, but the non joinder of his joint tenant may be shown in reduction of damages, Gen. Laws (1875), Tit. 19, Ch. v., § 8, p. 417.

Statute of Limitations as against Joint Tenants.

If the rights of one joint tenant have become barred by the Statute of Limitations the rights of all are barred, for, where a joint demise is de-

clared upon, all the claimants, thereby, must have the right of entry or none can recover, *Dickey v. Armstrong's Devisees*, 1 A. K. M. 39.

Joint Tenant cannot Devise his Estate.

A joint tenant has no power to devise his interest, for while he may convey his interest by deed *inter vivos*, yet when he dies the right of survivorship antedates and excludes any testamentary disposition, *Duncan v. Forrer*, 6 Binn. 193; *Nichols v. Denny*, 37 Miss. 59.

Joint Tenant cannot Convey a Portion of the Estate by Metes and Bounds, or the Entire Tract.

A joint tenant cannot convey by metes and bounds any part of the premises held jointly, and it is held that entry under a deed assuming to make such a conveyance will give no seizin, but will merely originate an adverse occupancy, *Porter v. Hill*, 9 Mass. 34; a joint tenant has no implied authority to convey the entire tract, and such conveyance, if attempted, will not bind his co-joint tenant, but will be adverse to him, *Larman v. Huey's Heirs*, 13 B. Mon. 436; nor can a joint tenant bind his cotenant by an agreement to convey unless he be expressly given authority or his action be subsequently ratified, *Hanks v. Enloe*, 33 Tex. 624.

Actions between Joint Tenants.

One joint tenant cannot maintain an action against another for trespass in respect to the land held jointly, Blackst. Com., Lib. 2, p. 183; and this immunity from action extends to a person doing an act upon the land by the authority or permission of the joint tenant, for a joint tenant is entitled to the occupancy of the whole tract, and is not compelled to occupy in person. This, which is the rule of the common law, is also the case in Louisiana, see *Shepherd v. Young*, 2 La. Ann. 238. For waste, however, a joint tenant is liable under the Statute of Westminster 2, c. 22; Blackst. Com., Lib. 2, p. 183. Joint tenants fall with the operation of the provisions for an account in the Statute of 4 Anne, c. 16, and similar statutes, which subject will be found treated in the note on tenants in common, on page 98.

Before the statute of Anne, one joint tenant had practically no remedy against his fellow who took more than his just share of the product of the land held jointly, this defect of the law is stated and the law itself quaintly exonerated from blame in the following passage of St. Germain: "If two men have a wood jointly, and the one of them selleth the wood

and keepeth all the money wholly to himself; in this case his fellow shall have no remedy against him by law; for as they, when they took the wood jointly, put each other in trust and were content to occupy together; so the law suffereth them to order the profits thereof according to the trust that each of them put the other in. And yet if one took all the profits, he is bound in conscience to restore the half to his fellow; for as the law giveth him right only to half the land, so it giveth him right only in conscience to half the profits. And yet, nevertheless, it cannot be said in that case, that the law is against conscience, for the law never willeth ne commandeth that one should take all the profits, but leaveth it to their conscience; so that no default can be found in the law, but in him that taketh all the profits to himself, may be assigned default, who is bound in conscience to reform it, if he will save his soul, though he cannot be compelled thereto by law," Doct. & Stud., Dial. I. Ch. 19.

Destruction of Joint Tenancy.

A joint tenancy is destructible by any act which destroys any one of the constituent unities. That of time, indeed, as it relates only to the commencement of the estate, when it has once attached, cannot be interfered with or affected by subsequent transactions. See Blackst. Com., Lib. 2, p. 185.

The estate may be destroyed without any alienation by disuniting the possession of the joint tenants. And here it may be remarked that, at common law while joint tenants might, if so disposed, make a partition of their estate, yet they were not compellable to do so, Litt. Sect. 290; but this has been altered by Statute 31 Hen. VIII. c. 1, and 32 Hen. VII. c. 32, and in many of the United States Acts have been passed with like effect; see Connecticut Gen. St. (Rev. 1875), Title 19, Ch. 17, Pt. xii. § 1, p. 480; Indiana, Rev. St. (1881), § 1186, p. 225; Kentucky, Gen. Laws (Bul. & Fel.), Ch. 63, § 13, p. 586; New Jersey, Stat. Rev. (1877), p. 795, pl. 1; Michigan, Howell's Annot. Stat. (1882), Tit. xxxi., Ch. 270, § 7850, p. 1961; Minnesota, Stats. (1878), Ch. 74, § 1, p. 807; Ohio, Stat. Tit. 1, D. 7, Ch. 9, § 5754, p. 1209; Maine, Rev. Stat. (1883), Ch. 88, §§ 1, 2, p. 748; Texas, Rev. Stat. (1879), Pt. 69, Art. 3465, p. 495; Vermont, Rev. Laws (1880), Ch. 70, § 1275, p. 288; Virginia, Code (1874), Tit. 34, Ch. 120, § 1, p. 920; Rhode Island, Pub. Stat. (1882), Ch. 230, § 1, p. 641, and the law now is that joint tenants are compellable to make partition.

The partition to work a severance need not be by a statutory proceeding, but an amicable partition by the tenants will destroy the joint tenancy, *Lessee of Davidson v. Heydon*, 2 Yeates, 459; *Overton v. Lacy*, 6 T. B. Mon. 13; but a partition cannot be well made by parol, *Porter v.*

Hill, 9 Mass. 34, though a severance in fact, followed by possession in accordance with the terms of the severance for twenty years, has been held to bar the jointure, *Drane v. Gregory's Heirs*, 3 B. Mon. 619.

In equity an agreement to sever may be equivalent to a severance, and an order of court that a division be made has been held to work a severance, *Postell et al. v. Executors of Skirving*, 1 Desau. 158.

A severance is worked by the destruction of the unity of title; thus if one joint tenant convey his share to a stranger, the joint tenancy is destroyed and the remaining joint tenant and the stranger become tenants in common, *Robison v. Codman*, 1 Sumn. 121; and so if one joint tenant make a deed in trust to pay his debts, *Lessee of Davidson v. Heydon*, 2 Yeates, 459, or execute a mortgage of his share of the property held jointly, *Lessee of Simpson v. Ammons*, 1 Binn. 175, or make a lease for life of his share, Litt. Sects. 302, 303. A covenant by a joint tenant to sell, although ineffectual at law to sever the jointure, will work a severance in equity, provided the agreement be one the specific performance of which could be enforced, *Brown v. Raindle*, 3 Ves. 256. But if there be more than two joint tenants, one tenant by a conveyance cannot destroy the right of survivorship as between, or amongst, the others, thus, if one of three joint tenants alien his share, the other two will still hold their parts by survivorship and joint tenancy, Litt. Sect. 294; Blackst. Com., Lib. 2, p. 186. A devise of a share by will has no effect upon the joint tenancy, *Duncan v. Forrer*, 6 Binn. 193.

A destruction of the unity of interest will sever the jointure, as where there are joint tenants for life, and one acquire the inheritance, Blackst. Com., Lib. 2, p. 186, although, as we have seen, if, at the commencement of the joint life estate, inheritance be given to one of the joint tenants and his heirs, the joint estate for life will be neither prevented nor destroyed; but where there are more than two joint tenants, the same rule is to be observed as in case of the conveyance of a share to a stranger, *i. e.*, that the one joint tenant cannot destroy the joint character of the tenure of the shares remaining after the abstraction of his own, thus, if, of three joint tenants, one release his share to one of his companions, the remaining two parts will be held in joint tenancy, Blackst. Com., Lib. 2, p. 186.

Coparcenary.

ANCUS M. HOFFAR AND WIFE v. JULIANA E. DEMENT,
ADMINISTRATRIX OF GEORGE DEMENT.

Court of Appeals of Maryland, December, 1847.

[Reported in 5 Gill, 132.]

J. died seized of a tract of land, leaving four children his heirs-at-law. N., without authority, sold the land to D., who entered upon it, and used it. The same land was afterwards sold under decree, by N. to D. In an action for use and occupation by one of the heirs of J., to recover her portion of the rent between the period of the two sales, it appeared that D. had admitted his obligation to pay rent or interest on the purchase-money, and promised to execute his note for the separate interest of the plaintiff on such rent: *Held*, that as D. entered under the contract of purchase, and not under any agreement or demise with the heirs of J., jointly or severally, to pay rent, this action could not be maintained.

In the action for use and occupation, the relation of landlord and tenant must be established between the plaintiff and defendant.

In this State, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the Act of 1820, ch. 191, sec. 5.

Whatever be the number of coparceners, they all constitute but one heir; are connected together by unity of interest and unity of title.

Coparceners cannot separately maintain an action for money had and received against a person who had received the rent of their land as trustee, nor recover in separate actions, upon an implied demise, upon a count for use and occupation.

Where an action is brought by one of several, with whom a contract has been made, the defendant may^s take advantage of it upon evidence at the trial, upon the plea of *non assumpsit*.

Admissions in a conversation, made by a defendant to a witness, who was *not* the agent of the plaintiff, nor had any authority to make a demand and to account, that he, the defendant, was liable to pay the plaintiff for the rent of property, and intended to give his note for it, is no evidence to support a count of *insimil computassent*.

APPEAL from Charles County Court.

This was an action of *assumpsit*, commenced on the 3d March, 1845,

by the appellants against the appellee. The defendant pleaded *non assumpsit* and limitations. The jury found a verdict for the defendant.

At the trial of this cause, the plaintiffs, to support the issues on their part joined, gave in evidence, that Joseph N. Stonestreet died several years ago, leaving four children, of whom Ellen Hoffar was one; that he left at his death, which happened about 1825, a tract of land in Charles County, the title to which descended to said children; that about 1831, the testator of defendant entered into possession of said lands, and occupied the same until his death, in September, 1843. And that said lands would rent for \$300 per annum. The plaintiffs then further proved, by Walter Mitchell, that, being employed as attorney for the plaintiffs, and of Catherine Stonestreet, another child of Jos. N. Stonestreet, he saw defendant's testator in August, 1843, as he believes, and demanded of him, for the occupation of said lands, the said rent, to be charged from the date of an illegal sale by Nicholas Stonestreet to the date of a public and authorized sale in 1836, at which said George Dement had purchased under a decree of sale duly passed. That said Mitchell then told said George Dement that he must settle this claim or be sued. Dement said that he was bound for the rent of the land between the period of the first or illegal sale by Col. N. Stonestreet and the sale under the decree of the Court of Equity; that it was not necessary to sue him. He only wished to see N. Stonestreet, to see what was done with his Mechanics' Bank of Alexandria paper, placed in the hands of Col. Stonestreet, to see how the dividend had been applied. It was a hard case. And as soon as he did so, he would pay either the amount of rent, or the interest of the purchase-money, as rent. It was not a matter of much moment, as the difference was not very great; no precise amount to be paid was agreed upon. He never denied his liability to pay rent, as he said he knew the first sale was made without authority, that he thought he ought not to pay for rent more than the interest on the purchase-money, as when he purchased the land he supposed Col. Stonestreet had authority to sell. Witness had a statement showing the annual rent and annual interest, which Dement did not dissent from. The amounts, etc., witness does not recollect. The rent demanded, and which he agreed to pay, was three years. The plaintiffs also proved, that before this suit was brought, and since the accruing of the rents as aforesaid, the said Ellen M. had intermarried with the said Ancus M. Hoffar; and that at the bringing

of this suit, E. N. Stonestreet, one of the children of said Noble Stonestreet, was an infant. The plaintiffs further proved, by W. B. Stone, that before the institution of this suit, he, as the attorney of Dr. Francis Neale, guardian of said Noble Stonestreet, then an infant, demanded of the said defendant's testator the amount claimed as coming from him to the said infant. That the said testator then agreed to pay his ward's separate part, being one-third, to said guardian, of the amount of interest upon the purchase-money of land, which testator alleged he had contracted to buy of Col. Stonestreet, belonging to the heirs of Jos. N. Stonestreet; and which the testator had occupied two or three years, under said contract, prior to a former legal sale, by order of the Equity Court, the precise amount of this interest and number of years for which it was due, were, at the time of this conversation, spoken of and agreed upon—the amount and time not now certainly recollected by the witness, but, according to his recollection, were \$240 to \$250 per year for three years. The witness then asked for the separate note of the testator for said ward's shares of this amount; and for the purpose of inducing said testator to settle the same. That witness stated that if he would give his note therefor, payable to said guardian, that the said guardian would assign said note to the administrator of said Nicholas Stonestreet, so that the said testator could settle any claims that he had against said Nicholas in his lifetime. That in stating this inducement, the witness had plenary powers from said guardian. That said testator acknowledged his liability, and promised to execute the note as above stated, and for the said purpose, but never did. That the amount of said note was to be for the separate interest of said infant. And the said testator agreed to settle with the other heirs separately; but he claimed in said conversation to be only responsible for the interest on the purchase-money for said land, which he averred had been sold to him by said Nicholas Stonestreet, at a private sale; and which interest was agreed between said testator and witness to be only for the time between said private sale and the public sale in 1836, as aforesaid. That the note was to be executed at the next visit of said testator to Port Tobacco, but he died shortly after; and that if the said note had been given, the said Stone would consider that it ought, by the agreement made, to have been assigned to the administrator of said Nicholas Stonestreet, as proposed by him. Upon the whole evidence, the defendant prayed the Court to instruct the jury as follows:—

That the plaintiffs are not entitled to recover under the first count in the declaration (which was for use and occupation on a *quantum meruit*), because there is no evidence to show that the defendant's testator had occupied the land mentioned by permission of the said plaintiffs, or either of them ; and because the promises stated in said count are variant from the promise stated in the evidence ; and because the evidence shows no right in the plaintiffs to maintain a separate suit in their own names, without joining the other children of said J. Noble Stonestreet. That the plaintiffs are not entitled to recover under their second count (an *insimil computassent*), because there is no evidence to show the ascertainment of any precise amount of indebtedness on the part of defendant's testator to plaintiffs ; and because the evidence shows no right of action in the plaintiffs, separate from the other children of J. Noble Stonestreet.

And that the plaintiffs are not entitled to recover under the third count (money had and received), because there is no evidence of defendant's testator having received any money to the separate use of the plaintiffs. And the court (MAGRUDER, C. J., and C. DORSEY, A. J.), being of the opinion that if a recovery could be had at all upon the testimony in this suit, the several heirs of J. N. Stonestreet should be united as plaintiffs; and furthermore, that there was no proof in the case from which the relation of landlord and tenant between the plaintiffs alone and defendant can be inferred, and that there is no proof to enable the plaintiffs to recover upon the other counts in the declaration, gave the instruction as prayed. The plaintiffs excepted.

The plaintiffs prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, and MARTIN, JJ., by *J. M. S. Causin*, for the appellants, and by *T. F. Bowie*, for the appellee.

SPENCE, J., delivered the opinion of this Court. This is an action of *assumpsit*. The declaration contains three counts : The first, for use and occupation ; the second, on an account stated ; and the third, for money had and received. The defendant pleaded *non assumpsit* and limitations.

Ellen M. Hoffar, the wife of Ancus M. Hoffar, the plaintiffs in this action, was one of the four children of Joseph N. Stonestreet, who died

intestate, seized of the real estate, to recover for the use and occupation of which, by the defendant's testator in his lifetime, this action was instituted. The county court decided that the plaintiffs could not recover on the first count in the declaration, because all of the heirs of Joseph N. Stonestreet should have been made plaintiffs; and because there was no evidence from which the relation of landlord and tenant could be inferred between the plaintiffs and the defendant's testator; and that there was no evidence in the cause which entitled them to recover under the second and third counts.

There is no evidence in the record of any express agreement or demise between these plaintiffs and the defendant's testator for the use and occupation of the lands mentioned in the declaration; but the proof is, that the defendant's testator entered upon the premises under a contract of purchase from Nicholas Stonestreet.

The first question to be disposed of is, whether the county court erred in deciding that the plaintiffs could not recover upon the first count in the declaration. We think they did not. The defendant's testator entered upon the land under a purchase from Nicholas Stonestreet, subsequent to the death of Joseph Stonestreet; there is no evidence of any express demise or agreement to rent by the heirs of Joseph Stonestreet, jointly or severally; in fact, the evidence is conclusive that there was none. The plaintiffs, to maintain this action, then, must rely upon an implied demise or agreement to establish the relation of landlord and tenant between George Dement, the defendant's testator, and the children of J. N. Stonestreet.

TINDAL, C. J., in the case of *Decharms v. Horwooa*, 10 Bingham's R. 526, expresses his opinion in this unequivocal language: "The authorities all agree that whatever be the number of coparceners, they all constitute but one heir—they are connected together by unity of interest and unity of title." In Maryland, the children of parents who die intestate, seized in fee of lands, tenements, or hereditaments, take as coparceners, and are so treated by the Act of 1820, ch. 191, sec. 5; and the conclusion is irresistible that if they cannot separately maintain an action of assumpsit for money had and received against a person who had received the rent in the character of trustee (as was decided in the case of *Decharms v. Horwood*) that they cannot recover in separate actions upon an implied demise or agreement to rent, upon a count for use and occupation.

It was insisted in the argument on the part of the appellant that the non-joinder could be taken advantage of by plea in abatement or demurrer only, and not upon evidence at the trial. This position is not tenable upon authority. "As, where an action is brought by one of several with whom a contract has been made, the defendant may take advantage of it upon evidence at the trial upon a plea of *non assumpsit*." 1 Saund. R., 153, note 1; 1 Chit. Pld., 7; 2 Strange, 820.

The county court decided that there was no evidence which entitled the plaintiffs to recover on the second count. The evidence given by William B. Stone, a witness on the trial, of admissions of the defendant's testator made to him, will not maintain the second count in the plaintiffs' declaration upon an account stated.

There is no evidence in the record to show that the witness Stone, to whom the admissions relied on were made, was the agent of the plaintiffs, or had authority to make a demand, or to account with the defendant's testator. The conclusion is from the evidence that he was not authorized.

An admission in conversation to a third person, not the plaintiffs' agent, is not sufficient to sustain a count upon an *insimul computassent*. Greenleaf on Evidence, 105.

There is no proof which even tends to maintain the issue on the third count.

Judgment affirmed.

Estates in coparcenary were at common law of two kinds: (I.) Coparcenary according to the course of the common law, which arose when a tenant died and his estate descended to females, or heirs of females, for want of a nearer male heir, Litt. §§ 241, 242, 254. (II.) Coparcenary by the custom, which arose where a person died seized of gavelkind lands in Kent, North Wales and some other localities, since by the custom of those places the land descended equally to all the sons, Litt. § 265.

Characteristic of Estate in Coparcenary.

The essential characteristic of the estate in coparcenary, of either kind, was that it could arise only by descent. As in all of the United States, the descent of land is to the heirs equally in their degree, it follows that

whenever we have an estate by descent, taken by more than one heir, we have an estate resembling, in this particular, coparcenary; in Maryland, by the Act of 1820, ch. 191, § 5, it is expressly declared that children of parents who die intestate shall take as coparceners, *Hoffar v. Dement*, 5 Gill, 132.

Resemblance and Difference between Coparceners and Joint Tenants.

Coparceners resemble joint tenants in having the same unities of title, interest and possession, Litt. §§ 241, 242; 4 Kent, Com. 366; and they are said to constitute together but one heir, Co. Litt. 164 a; *Gilpin v. Hollingsworth*, 3 Md. 190; *Hoffar v. Dement*, 5 Gill, 132; they must, therefore, join in an action to recover rent upon an implied demise, *Hoffar v. Dement, supra*; or to recover land of which the ancestor has died seized, *Daniels v. Daniels*, 7 Mass. 134; but though they have a unity, they have not an entirety of interest; each is entitled to the whole of a distinct moiety; and the *jus accrescendi* does not exist between them, 2 Blackst. Com. 188; *Campbell v. Heron*, 1 Tayl. 199; and the unity of their freehold is to be confined to its relation to strangers, for as between themselves, the coparceners have, for many purposes, several freeholds, and they may enfeoff, or make livery to, each other, or convey one to another by way of release, Co. Litt. 200 b.

Resemblance between Coparceners and Tenants in Common brought about by Statute.

Under the American statutes on the subject of joint tenancy, tenancy in common and coparcenary and upon the subject of descents, coparceners, although they are repeatedly named in statutes, differ so little, as to their rights, from tenants in common, *Root v. McFerrin*, 37 Miss. 17, that to speak further of the rights attached to the estate in coparcenary would be to run the risk of useless repetition, and the reader is, therefore, referred to the note on tenancy in common for a statement of the law, in general, governing estates in coparcenary.

Tenancy in Common.

GRISWOLD v. JOHNSON.

Supreme Court of Errors of Connecticut, New London, July, 1824.

[Reported in 5 Connecticut Reports, p. 363.]

Where A. devised to B. and C., his sons, a tract of land, lying *easterly* of a certain brook, “to be equally divided between them for quantity and quality, and B. to have the part next the brook,” it was *held*, that such devise vested in the devisees a tenancy in common.

A deed, by one tenant in common, of part of the common estate, describing it by metes and bounds, is void.

THIS was an action of ejectment, tried at New London, October . Term, 1823, before PETERS, J.

The plaintiff claimed title, by virtue of a deed from Charles Griswold, administrator *de bonis non* with the will annexed of Dyar Throop, deceased. In support of the title of Dyar Throop, the plaintiff produced the will of his father, Rev. Benjamin Throop, deceased, containing the following devise: “To my two sons, Dyar and Benjamin, I give and bequeath to them, and their heirs and assigns, that part of my farm which lies easterly of Wolf-swamp Brook, to be equally divided between them, for quantity and quality; and that my son Dyar have the part next the brook; upon the consideration that they bear their proportion with my other son, William, in paying what debts and legacies my personal estate will not answer, if any there be.” That part of the farm, which lay easterly of Wolf-swamp Brook, was a tract of about thirty-seven acres; and the administrator’s deed to the plaintiff contained about seventeen acres of that part of such tract lying next adjoining the brook, including the demanded premises, and described the land, which it purported to convey, by metes and bounds. The plaintiff claimed, and adduced evidence to prove, that such land was one-half in quantity and quality of the tract of thirty-seven acres. He also claimed that Dyar Throop took such land, under the devise, as an estate in severalty. The Judge instructed the jury, that Dyar and Benjamin, under the devise, took the tract lying easterly of the brook, as

tenants in common; and that the deed, as it embraced but a part of such common estate, describing it by metes and bounds, was void, and conveyed no title whatever to the plaintiff.

The defendant claimed, and adduced evidence to prove, that Dyar refused to take any of the land under the devise. The plaintiff insisted, that admitting such refusal, Dyar's part thereupon became intestate estate, and he became vested with an interest therein, as tenant in common with the other heirs of the testator; and that the administrator's deed to the plaintiff, whether it contained the whole or a part of the common estate, conveyed the whole of Dyar's common interest in the land described in that deed. The Judge instructed the jury, that if the deed embraced any quantity of the common estate less than the whole, describing it by metes and bounds, such conveyance was in law null and void.

The jury returned a verdict for the defendant; and the plaintiff moved for a new trial, for a misdirection.

Gurley and *C. Perkins*, in support of the motion, contended: 1. That Dyar and Benjamin, under the devise, took each an estate in severalty, and not a tenancy in common. The testator contemplated a division of the tract east of the brook into two parts; one of which, viz., the one next the brook was to be Dyar's, and the other Benjamin's. The will did not specify the dividing line; but it furnished a rule by which that line might be ascertained. At any rate, Dyar was to be the sole owner of the part next the brook; and Benjamin was to be the sole owner of the other. Dyar had no right to the possession of the part fartherest from the brook; and Benjamin had no right to the possession of the part next the brook. There was, then, no unity of possession, or right of possession, pervading the whole tract, which is essential to a tenancy in common. 2 Blackst. Com. 191, 2. *Right d. Compton et al. v. Compton*, 9 East, 267.

2. That if the estate devised was a tenancy in common, still a conveyance, by one tenant in common, of a part of the undivided land, describing it by metes and bounds, may be effected. [Upon an intimation from the Chief Justice that this point had been settled the other way, it was not farther pressed.]

H. Strong, contra, insisted: 1. That by the will Dyar and Benjamin were tenants in common of all the land devised to them; there not being

any part of it which either of them could claim exclusively as his own. The testator evidently contemplated a partition to be made after the estate should become vested in the devisees.

2. That the deed given by Dyar's administrator to the plaintiff was void, being of a part only of the common estate, described by metes and bounds. *Hinman v. Leavenworth*, 2 Conn. Rep. 244, n.; *Starr v. Leavitt*, Id. 243; *Mitchell v. Hazen*, 4 Id. 495; *Porter v. Hill*, 9 Mass. Rep. 34.

HOSMER, C. J.—The plaintiff claims title by deed from Charles Griswold, the administrator *de bonis non*, with the will annexed, of Dyar Throop, deceased. The Rev. Benjamin Throop made his last will, devising to his sons, Dyar and Benjamin, a tract of land, of which the premises demanded is part, in manner following: “To my two sons, Dyar and Benjamin, I give and bequeath to them, their heirs and assigns, that part of my farm which lies easterly of Wolf-swamp Brook, to be equally divided between them for *quantity and quality*, and that my son Dyar have the part next the brook.” The above tract contained thirty-seven acres, and the aforesaid administrator, duly authorized by the Court of Probate, gave to the plaintiff a deed of seventeen acres thereof, by metes and bounds, of that part of said land which lies next adjoining the brook aforesaid. The plaintiff insists, that Dyar Throop, under the aforesaid devise, took the land described in the above deed as an estate in severalty; while the defendant urges that the said Dyar and Benjamin had title to the aforesaid land, east of the brook, as tenants in common. The Court charged the jury in conformity with the defendant's claim; and that if the said deed embraced any quantity of said common estate, less than the whole, by metes and bounds, such conveyance in law was null and void.

Whether the charge of the Court was correct depends on the answer which the law gives to two questions, namely: Was the estate in question devised in common to Dyar and Benjamin? and, if so, was the deed invalid?

1. Tenants in common are such as hold by unity of possession, because none knoweth his own severalty, and they occupy promiscuously. Co. Litt. Sec. 292; 2 Blackst. Com. 191. The infallible criterion of this species of estate, is, that no one knoweth his own severalty; and hence the possession of the estate necessarily is in common until a legal partition be made. But of an estate in severalty the criterion is, that a man

knows what he has the exclusive right of possessing ; and his possession is sole, because no person has right to occupy with him. If an estate is given to a plurality of persons, without any restrictive, exclusive, and explanatory words, from the nature of the case they are tenants in common. 2 Blackst. Com. 192, 180. If the grant superadds that the property "is to be equally divided" between them, the estate is held in common, because these words are inapplicable to a several estate. 2 Blackst. Com. 192. Now, in the case under discussion, the devise to Dyar and Benjamin of a tract of land, constituted a tenancy in common on the preceding principles ; and this more particularly is evinced by the words "to be equally divided between them, for quantity and quality ;" an expression indicating a future division of the property devised. The expression that "Dyar to have the part next the brook," construing the devise in all its parts together, and not disjointly, denotes merely this : that when a future division of the property shall be made, Dyar shall have his portion assigned him in the place specified. It, however, has no possible effect on the tenancy in common necessarily arising from the unity of possession ; nor can it operate to produce such estate, unless by exchanging the former words, instead of giving them their legal construction. The claim that Dyar had devised to him an interest in severalty is not a little extravagant, inasmuch as the wisdom of the wisest would be baffled in the ascertainment of the bounds of this supposed several estate. The question what is its quantity, its form, its location, no one except a competent judiciary can resolve. No bounds are mentioned ; no lines are prescribed ; no quantity is given. A Court can take cognizance of the case ; and, in a legal mode, well understood, determine the quantity by the quality of the land, and, on principles of justice, assign a distinct location to each of the devisees ; but there is no competency to the performance of either of these acts by an individual.

2. The deed of this common estate, by metes and bounds, the one tenant in common thus attempting to make a partition of the property, without any co-operation of the other, is, undoubtedly, void. The point is at rest, and not to be questioned. *Hinman v. Leavenworth*, 2 Conn. Rep. 244, n ; *Starr v. Leavitt*, 2 Id. 243 ; *Mitchell v. Hazen*, 4 Id. 495 ; *Bartlett v. Harlow*, 12 Mass. Rep. 348 ; *Porter v. Hill*, 9 Id. 34.

The determination of the Judge below was correct, and no new trial is to be granted.

PETERS, BRAINARD, and BRISTOL, JJ., were of the same opinion.

New trial not to be granted.

"Tenants in common are they," says LITTLETON, "which have lands or tenements in fee simple, fee tail, or for term of life, etc.; and they have such lands or tenements by several titles and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common," Litt. Sect. 292, and see *Den ex d. Popino v. Cook*, 7 N. J. Law, 41.

BLACKSTONE's definition is more concise: "Tenants in common are such as hold by several and distinct titles but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously," Blackst. Com., Lib. 2, p. 191.

Tenancy in Common could formerly be by Purchase only—In this Country it may be by Descent.

By the English common law a tenancy in common could originate only by purchase, Tudor, L. C. 893, and hence could be created only by deed or will; but in this country the estate may arise also by a descent, 4 Kent, Com. p. 367. This—which appears to be the result of the absence of the right of primogeniture, on the one hand, and of the modern tendency of the courts to strike down joint tenancy, on the other—is, in certain States, provided for by statutes declaring that co-heirs shall take as tenants in common.

Unity of Possession only required to make Tenancy in Common.

The only unity required to constitute a tenancy in common is the unity of possession. The time of beginning of possession may be different in the case of each tenant, the titles of the different tenants may be wholly diverse, and they may hold different interests and for different estates in the land or tenement, but so long as the possession is one the estate will be held one in common, Blackst. Com., Lib. 2, 191, 192; *Spencer v. Austin*, 38 Vt. 258.

The tenants may even hold by different tenures, as if there be two tenants in common and the share of one become vested in the sovereign or the State by escheat or attainer, and said share be granted to another person to hold by a tenure utterly different from the original and from that by which the other tenant still holds his share, the last-mentioned tenant will continue to hold in cotenancy and his rights will not be affected by the change in the tenure of the other moiety, *Putnam v. Ritchie*, 6 Paige, 390.

Creation of Estate in Common—Presumption in Favor of Tenancy in Common as against Joint Tenancy.

We shall, first, consider the creation of estates in common by deed or devise, where such an estate is expressly created or where the intention to create it is implied from the words of the instrument; and, second, the creation of estates in common by acts which the law construes as making a tenancy in common, including therein the creation of such estates in common as arise from the situation or relation of the tenants.

As has been before stated, the old law favored such a construction of a deed or devise conferring a joint interest as would give to the grantees or devisees an estate in joint tenancy (see p. 18 *et seq.*); but the modern tendency, even independent of the statutes on the subject (for which see p. 20), is in favor of such a construction as will give an estate in common, *Campbell v. Heron*, 1 Tayl. 199; *Caines et al. v. The Lessee of Grant*, 5 Binn. 119; although, independent of statute, the law does not carry its policy so far as to strike down a joint tenancy where no circumstances appear in the instrument rendering it probable that the testator or grantor intended to give an estate in common, and his expressions, strictly taken, give a joint estate, *Barclay v. Hendricks's Heirs*, 3 Dana, 378.

Such being the rule, a deed to certain persons, showing an intent that there should be more than one source of future inheritance, will create a tenancy in common, as in *Bambaugh v. Bambaugh*, 11 S. & R. 191, where a deed was made "to Conrad and Abraham Bambaugh, and to their heirs and assigns," *habendum* "to the said Conrad and Abraham, their and each of their heirs and assigns forever," and in *Galbraith et al. v. The Lessee of Galbraith et al.*, 3 S. & R. 391, where a deed was made to two persons, "to them or any of them, their or any of their heirs or assigns," *habendum* "to them, their heirs and assigns forever." These two cases, decided by the same Court, illustrate the favor showed to the interpretation which would give a tenancy in common. In the first cited the premises would have given an estate in joint tenancy but the *habendum* caused a doubt as to the intent to create such an estate, and in the second the doubt appeared in the premises, while the *habendum*, if strictly followed, would have made an estate in joint tenancy, yet in each case the estate was held an estate in common; it seems, therefore, to be enough to call into action the presumption against joint tenancy, that a doubt should be found somewhere on the face of the instrument as to the character of the joint estate intended to be conferred.

Words looking to a Division of the Estate given.

Wherever the instrument contains words looking towards a division of the property devised or conveyed there a tenancy in common is created, as said by TILGHMAN, C. J., in *Martin v. Smith*, 5 Binn. 16: "Where it appears, either by express words or from the nature of the case, that it was the testator's intent that the estate should be divided, it then becomes a tenancy in common." Thus, a devise of land to be equally divided amongst the devisees will give an estate in common, *Doe d. Harrison v. Botts*, 4 Bibb, 420; *Emerson v. Cutler*, 14 Pick. 108; *Briscoe v. McGee*, 2 J. J. Mar. 370; *Maddox v. The State*, 4 H. & J. 539; *Martin v. Smith*, 5 Binn. 16; *Gilpin v. Hollingsworth*, 3 Md. 190; *Den d. Midford v. Hardison*, 3 Murph. 164; *Den ex d. Pinkerton v. Laquear*, 4 N. J. Law, 301; *Griswold v. Johnson*, 5 Conn. 363; the effect is the same where the provision is that a certain person shall divide the estate, *Den ex d. Popino v. Cook*, 7 N. J. Law, 41; or where the division is spoken of as contingent, *Id.* The effect is not destroyed by the postponement of the division of the estate to some fixed time, *Weir v. Humphries*, 4 Ired. Eq. 264; *Miller v. Keegan*, 14 Ind. 502; *Allison v. Kurtz*, 2 Watts, 185; *Den ex d. Popino v. Cook*, *supra*; and in *Doe ex d. Harrison v. Botts*, 4 Bibb, 420, the estate given was held to be one in common, although, in addition to the postponement of division, the instrument creating the estate contained a provision that in case any one of the devisees should die, before the time appointed for taking possession of his share, his share should be equally divided amongst the survivors.

A devise to certain persons, "share and share alike," will give them an estate in common, *Irwin v. Dunwoody*, 17 S. & R. 61; *Jackson ex d. Kip v. Kip*, 2 Paine C. C. 366; *Martin v. Smith*, *supra*. And the use of the expression "share and share alike" has been held to destroy the usual presumption of joint tenancy in a devise to residuary legatees, *Provenchere's Estate*, 1 Leg. Gaz. Rep. 68; and so where the devise is to certain persons "equally," no mention being made of a division, *Evans v. Britain*, 3 S. & R. 135. Courts have gone very far to discover an intent to put devisees upon an equality and from thence to infer an intent to give a tenancy in common; thus, in the early case of *McPherson v. McPherson*, Add. 327, there was a devise "to my sons Alexander and Robert all that plantation or tract of land I purchased from Samuel Williams to them, and their lawful heirs and assigns, to be in full possession of the said Alexander and Robert, until such time as my son John personally appears and demands the said plantation, then it is my will that my sons Alexander and Robert, or their lawful heirs, do peaceably and quietly yield and give up the same to my son John." In a subsequent portion of the will

the testator provided that any money left after the payment of "the legacies and bequeathments" should be equally divided between his wife and his sons Alexander and Robert. The Supreme Court held that the estate given to the sons was a joint tenancy. In the High Court of Errors and Appeals, SHIPPEN and COX, JJ., were for affirming the decision of the Supreme Court, on the ground that the legal effect of the words employed by the testator was to make a joint tenancy and there was no clear intention apparent that the devisees should take otherwise than as joint tenants; but the majority of the court (CHEW, P., SMITH, ADDISON, HENRY, and RIDDEL, JJ.) was of a contrary opinion and held that an estate in common had been given, because, from the tenor of the whole will, it appeared that the testator evidently intended that there should be equality between his two sons and that the equality should be real and not fanciful, and because the will contained the provision that, on the return of John, Alexander and Robert, "or" their heirs, should surrender the plantation, of which direction, the court said, the natural construction was, that "his sons, if both alive, should give it up; or, if either of them was dead, that the survivor and the heirs of the other should give it up; or, if both were dead, that the heirs of both should give it up, and this construction can consist only with a tenancy in common."

A devise of a part may give an estate in common, thus in *Martin v. Smith*, 5 Binn. 16, there was a devise as follows: "I will that one-third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children." The expression "her part," etc., was held to point to a division and therefore to make an estate in common; and the same inference has been drawn from the devise of a portion, numerically expressed, see *Andrews v. Boyd*, 5 Me. 199

Where a testator devises to A. a tract of land and to B. a larger tract which includes A.'s tract of land, A. and B. will hold the smaller tract as tenants in common, *Seckel v. Engle*, 2 Rawle, 68.

Even where there are words making a joint tenancy the rule of favoring tenancy in common is so strong that words looking towards equality or division will raise a doubt as to intention which doubt will be determined against an intent to give a joint tenancy, thus in *Evans v. Brittain*, 3 S. & R. 135, there was a devise of land "equally to Isaac Evans and his heirs and to my brother David's eldest son, James Evans and his heirs, jointly to be enjoyed by them, their heirs and assigns forever." The court held that notwithstanding the provision for joint enjoyment the estate was taken in common, TILGHMAN, C. J., saying: "For many years past the judicial current has set strong against joint

tenancy and justly; because a tenancy in common makes a more equal provision for families and is generally more agreeable to the real intent of the testator. No court has ventured to construe strict words of joint tenancy as a tenancy in common; but slight expressions have been caught at to avoid a joint tenancy. The words *equally to be divided* or *equally* without more are sufficient to make a tenancy in common. The former part of this devise, ‘*equally* to Daniel’s eldest son and his heirs, and David’s eldest son and his heirs,’ would be a clear tenancy in common; the intent is too plain to admit of a doubt; nor do I think that this intent is destroyed by the subsequent expressions ‘jointly to be enjoyed by them, their heirs and assigns.’ It is not to be supposed that a man should have two contrary intentions at the same time and express them both in the same sentence. The latter words in this case indicate an intent that the *heirs of each nephew* should enjoy the land, which is inconsistent with joint tenancy. But, how are we to construe the words to be *jointly enjoyed*, etc.? I believe the testator intended to use those expressions in their literal sense; the sense which any man, not a lawyer, would attach to them; that is to say, that after the death of his nephews, their heirs should hold the land *together*; and this they would do in case of a tenancy in common until partition made. Before partition tenants in common hold *together* and *undivided*. It is much more reasonable to give this construction to the latter part of the devise than to suppose that the testator had all at once changed his mind and given the whole to the survivor, just after declaring that it should go equally to each and to the heirs of each. I am well satisfied of the intent and am for fulfilling it as there is no rule of law to the contrary. My opinion is, that an estate in fee passed to the nephews as tenants in common.”

Where Provision for Division does and does not give Estate in Severalty.

It sometimes becomes important to consider whether a devise pointing to or providing for a division does not give an estate in severalty; and first it is to be noted that where there is direction that division be made “according to law” it will not prevent the devise from enuring as a tenancy in common, thus in *Pruden v. Paxton*, 79 N. C. 446, the testator after a devise to his widow for life of an amount of land, which exceeded her dower, devised all his other property, which included a farm, to his “beloved wife and dear children, to be divided according to law.” It was argued that the devise gave the widow but a life estate in the farm, as the law gave her nothing more than an estate for life in the realty; but the court held

that the widow and children took the farm together as tenants in common. A mere general direction as to how division is to be made will not prevent the estate given from being in common; thus in *Walker v. Dewing*, 8 Pick. 520, there was a devise to two sons of "the farm on which I now live . . . the same to be equally divided between my two sons aforesaid, both in quantity and quality in manner following, viz: I bequeath to my son Israel, aforesaid, the southwardly end of said farm except five acres, together with all that part of the meadow that lieth on the northeast side of the ditch that is cut through my meadow. I also bequeath to my son Timothy, aforesaid, the northwardly end of said farm, except the piece of meadow bequeathed to my son Israel, together with five acres before excepted at the southwest corner of said farm, next adjoining to James Gillen, to extend on the road eastwardly so far as to include the five acres, and then with a straight line to the pond for a privilege of water; the farm aforesaid is hereby bequeathed to my two sons aforesaid." The estate was held to be in common, although the reporter in his syllabus falls into error and says it was held to be in severalty; and see also *Corwine v. Mace*, 36 Oh. St. 125, in which case there was a devise of land to three persons "the said P. B. Hays and J. D. Corwine to have their half on the upper side thereof, and the said Mace on the lower side." **McILVAINE**, C. J., said: "We entertain no doubt that the half of the farm which Hays and Corwine were to have on the upper side and the half which Mace was to have on the lower side of the farm are to be ascertained and measured not according to acreage, but according to the value of the interest described in the dispositive clauses of the codicil." In the same case it was held that the mere omission in the codicil of the word "undivided," which had been employed in the body of the will, would not change the devise from one in common to one in severalty; and so where there is a devise of a certain portion or proportion with power to the devisee to select the place where the portion is to be taken, this power does not prevent an estate in common being taken, as in *Brown v. Bailey*, 1 Metc. (Mass.) 254, where the devise was of one-fifth of certain land "to be taken when he (the devisee) should select at a just valuation." But there may be a devise apparently of proportions, and yet the part to be taken by each devisee may be so clearly pointed out that, notwithstanding the form of the devise, the devisees will take in severalty. Thus in *Frederick v. Gray*, 10 S. & R. 182, there was a devise of one-half of a plantation "to my sister, Mary Gray, to be taken off the side lying next to my brother James's plantation, the other half to my wife Hanna and daughter Jane." This was held a devise of half of the area of the farm to each in severalty, there being no provision as to equality in the value or quality of the land to be taken, so

that no doubt existed as to what each devisee was to take, other than could be resolved by the use of the surveyor's instruments. TILGHMAN, C. J., in delivering judgment, said: "Tenants in common have unity of possession of the whole, which certainly these devisees have not, and on a writ of partition between tenants in common, the land is divided not according to quantity, but value; one may have greater quantity and yet no more than an equal value. But the partition between these devisees was according to quantity and each was to have his quantity in a certain place." And see *Fleming v. Kerr*, 10 Watts, 444; but if any element of uncertainty of location is left in the devise, then, although the division of land is to be made regard being had merely to quantity, there may be a tenancy in common. This is well illustrated by the case of *Partridge, Lessee, v. Colegate et al.*, 3 Harr. & McH. 330, decided in 1796. In that case there was a devise to the three sons of the testator of all his land, the devise being explained as follows: "But my will and meaning is that my aforesaid two sons, *William* and *John Partridge*, shall have all those tracts . . . called Thomas's Adventure, part of Good Luck, Thomas's Range, and the Glebe Land, to be equally divided in quantity without having any regard to quality between my aforesaid two sons . . . and my will is that my aforesaid son *William Partridge* shall have in his part all the aforesaid Glebe land, and my son *John Partridge* shall have in his part all the aforesaid Glebe land [*sic in report*; from the argument of Cooke and Martin it appears to be a misprint for Good Luck] and my son *John* to have in his part of the aforesaid lands all the plantation whereon I now dwell." The question raised was as to the estate given in the tract known as Thomas's Adventure, the General Court held it to be an estate in common; on appeal Luther Martin, then Attorney-General of Maryland, argued that the direction that the land should be divided in quantity, without regard to quality, proved that there was no design to create a tenancy in common, the learned counsel regarding as essential to such tenancy the right to have the land divided with reference to both quality and quantity, and that the devise was really of an equal half of the land to each in severalty, the half on which the plantation was being given to John, and the other half to William. The Court of Appeals affirmed the decision of the court below and held that in Thomas's Adventure an estate in common passed to William and John.

Creation of Tenancy in Common by Deed—Words looking to Division.

The same rule that words looking to a division will give rise to a tenancy in common, which we have seen above applied where the construction of

a devise has been the matter before the court, is applied in the case of the construction of a deed; *Griswold v. Johnson*, 5 Conn. 363; and see the remarks of SHAW, C. J., in *Emerson v. Cutler*, 14 Pick. 108; and an intimation that a division is to be made may be found in the fact that in a deed to two by the same words of conveyance there is a discrimination made as to the extent of interest to be taken by each, *Craig v. Taylor*, 6 B. Mon. 457; and so where there is a conveyance which states a proportion, as one-half of a certain piece of ground in quantity and quality, *Adams v. Frothingham*, 3 Mass. 352; or one-half of an entire parcel of land or a tenement without more, *Hapgood v. Whitman*, 13 Mass. 464; *Child v. Wells*, 13 Pick. 121; *Cheshire v. Shutesbury*, 7 Metc. 566; *Presbrey v. Presbrey*, 13 Allen, 281.

The fact that the deed contains general directions as to how the division is to be made, or that it even points out the general locality in which each part is to be taken, will not prevent the estate granted from taking effect as an estate in common. Thus in *Griswold v. Johnson* the conveyance was to two sons, "to be equally divided between them for quantity and quality, and that my son Dyar have the part next the brook." The deed was held to give an estate in common, the court holding that the allusion to the part next the brook had reference only to the time of partition. HOSMER, C. J., characterized the claim that Dyar had an estate in severalty as extravagant, saying "the wisdom of the wisest would be baffled in the ascertainment of this supposed several estate." But where a deed is made for a certain proportion of a tract, and so designates the part to be taken that it can be run off by a surveyor, no tenancy in common will arise, *Wheeler v. Ladd*, 40 Ark. 108; and so where a given number of acres is conveyed with directions as to the location of the acres, as in *Clapp v. Beardsley*, 1 Verm. 151, where the conveyance was of "twenty-eight acres off from the lot laid to the right of John Wood, adjoining," etc.; but the mere fact that a number of acres is mentioned will not prevent the grant being to hold in common; to have that effect the locality must be in some way specified, so that it shall appear that the intent of the deed was to grant certain particular land rather than a certain interest in land; thus, in *Preston v. Robinson*, 24 Verm. 583, one Attwood made a deed to one person for seventy-six acres of lot No. 137, and to another for one hundred acres of the same lot; in holding that the grantees took as tenants in common, REDFIELD, J., said: "We are not prepared to say that if it were necessary to decide that point, that the deeding of a given number of acres to one man and another number to another, thus conveying the whole right to both, there being nothing to show that the land was intended to be conveyed in severalty, it ought not to be regarded as creating a tenancy in common. We

think it would. The case of *Clapp v. Beardsley* (1 Verm. 151) is evidently put upon the ground that the number of acres by the deed were intended to be adjoining the other land, and so compose a particular portion of the lot. But here there seems to be nothing to show any such intention, and it seems to us that plaintiff and J. P. are properly regarded as holding the lot in common in the proportion of the number of acres specified in their deeds." See, also, *Wallace v. Miller*, 52 Cal. 655, where the court said that in the case of a deed for a certain number of acres of a larger tract, the deed containing no further description of the land granted, the grantee would take as tenant in common an interest which would be represented by a fraction having for its numerator the number of acres conveyed, and for the denominator the number of acres in the entire tract, and that such interest would cohere in all parts of the tract.

And where an apparent conflict in the terms of a deed existed, it has been held that a tenancy in common was granted; thus in *Presbrey v. Presbrey*, 13 Allen, 281, there was a deed for one undivided half of a certain lot and "one undivided half of the buildings, being the lower tenement in said house thereon erected," it was held that the deed passed an estate in common, and the reference to the lower tenement was rejected as being repugnant to such tenancy.

The same rule prevails as between joint tenancy and tenancy in common, where there is a conflict in the terms of an instrument, in the case of a deed as prevails in the case of a will; see *Galbraith v. Galbraith*, 3 S. & R. 392, in which case the court went to considerable lengths to reconcile conflicting premises and *habendum*, and held the estate given to be one in common.

Deeds to One and his Children *in esse*.

A deed to one and his children *in esse* will create an estate in common, and not an estate tail in the father; *Hunt v. Satterwhite*, 85 N. C. 73; *Moore v. Leach*, 5 Jones, 88; *Gay v. Baker*, 5 Jones's Eq. 344; *Sherlock v. Shirlock*, 5 Pa. St. 367; *Burrell v. Little*, 1 Pittsb. 237.

Deed reserving a Privilege or Estate.

A deed reserving a privilege will not constitute the grantor and grantees tenants in common, *Abbott v. Wood*, 13 Me. 115; but a deed reserving an estate, *e. g.*, dower, will cause the grantor and grantee to hold in common, *Payne et ux. v. Parker*, 10 Me. 178; and so where what is reserved by the deed is a part of the realty itself so intimately connected with the rest that its enjoyment is impossible without a com-

mon possession of the land—as where land is granted with a reservation of the growing timber, until the timber is severed there will be a tenancy in common by the grantor and grantee, *Wheeler v. Carpenter*, 107 Pa. St. 271; and see *Boults v. Mitchell*, 15 Id. 364. A grant of a mining right upon certain premises will not constitute the grantee a tenant in common with the grantor, *Smith v. Cooley*, 65 Cal. 46. A mining right must be distinguished from a mining *claim*, in which there may be a cotenancy such as will support partition, *Hughes v. Devlin*, 23 Cal. 502, for the latter is treated as an estate of freehold, *Merritt v. Judd*, 14 Cal. 60, while the former is a bare right to take minerals from the land of another.

Title derived from Governmental Grant.

While, as we have seen (*ante*, p. 19), the title derived from governmental grants and patents is generally joint, yet a patent may be to two or more as tenants in common, *Currie v. Tibb's Heirs*, 5 T. B. Mon. 440, hence, where, after the grant in common and before the issue of the patent, one grantee dies, the surviving grantee will take by the patent but a moiety, and the heirs of the deceased grantee will, in the absence of legislation affecting the question, take nothing, *Id.* In *Caines et al. v. The Lessee of Grant*, 5 Binn. 119, two obtained a warrant, paying equally therefor, and before a patent was issued one died, the court guided by the inclination of the law against joint tenancy, held that a warrant and payment were not equal in all respects to a patent, and that hence there was no legal joint tenancy and survivorship. *TILGHMAN*, C. J., saying, "We are to consider the case as if application were now made for a patent. Where a patent is taken in joint tenancy there is no ground for conjecture as to the intent of the parties. They must be presumed to know the law and to have made their election to take the chance of survivorship. But without some evidence of this intention stronger than that which arises from the warrant, survey and payment of purchase-money it appears to me that the scale inclines in favor of an estate in common."

In Massachusetts the rule is different, and there a governmental grant to several is presumptively in common, *Higbee v. Rice*, 5 Mass. 344.

Effect of Statute on Presumption in Favor of Intention to Give Estate in Common.

The effect of the various statutes referred to upon p. 20 *et seq.*, upon wills or deeds which fall within their provisions is to strongly increase the presumption in favor of the creation of a tenancy in common rather than

a joint tenancy, thus in *M'Vey v. Latta*, 4 W. N. C. 524, a devise to two daughters "jointly and equally . . . or if one should die the survivor to hold the property in full" was held to create an estate in common and not a joint tenancy, and the provision for survivorship was, on the authority of *Fulton v. Fulton*, 2 Grant, 28; *Johnson v. Morton*, 10 Pa. St. 245, *Caldwell v. Skilton*, 13 Id. 152, and *Cresson's Appeal*, 76 Id. 19, held to refer to a death occurring in the lifetime of the testatrix.

A devise to two or more *nominatim* will create a tenancy in common, *Kennedy's Appeal*, 60 Pa. St. 511; *Gilman v. Morrill*, 8 Verm. 74, and the subjection of the devise to a common charge will not render the tenancy a joint one, *Lamb v. Clark*, 29 Verm. 273, and a devise to two on condition that neither shall make any claim against the testator's estate is held to give a tenancy in common, so that a breach of this condition by claims made by one will have the effect of working a forfeiture of the share of the claimant only, *Sackett v. Mallory*, 1 Metc. 355.

There may be a tenancy in common by a devise to more than one *nominatim* although a power is given to one of the cotenants to dispose of the land in a certain contingency. Thus, in *Proctor v. Smith*, 8 Bush, 81, there was a devise as follows: "I bequeath to my wife Angelina, and her three children, Beatrice, Dunlop, and Scotta . . . to be delivered up to my wife as the executrix of my estate and guardian of our three aforesaid children. I furthermore declare that she hold in her possession and control all my money, personal and real estate as long as she lives with full power to dispose of and divide it in any way she may think proper in case of the marriage of any of my children, without incommodeing herself and the children that may remain with her." The widow sold a piece of the testator's realty with warranty; the children after her death brought action therefor; it was held that the wife and children were tenants in common, and, therefore, that her deed did not affect the rights of the children.

Estate in Common Arising from Articles of Sale.

Articles of sale made to two or more will render them in equity tenants in common of the land to be conveyed, *Arnold v. Cessna*, 25 Pa. St. 34.

Tenancy in Common Arising from Relations of the Tenants.

Tenancy in common may also arise from the relations of the tenants; thus members of an unincorporated company, established by an Act of the Legislature, will, in the absence of any statutory provisions to the contrary, hold the property of the company as tenants in common, *Haven v. Mehlgarten*, 19 Ill. 91; and so will the members of a voluntary un-

incorporated society which has no legislative recognition and is not of the class authorized by statute to hold real estate, *Byam v. Bickford*, 140 Mass. 81; but in *Lockwood v. Mills*, 3 Ohio, 21, where a land company had made allotment to its members, it was held that there was no tenancy in common of the undistributed surplus. Where a mortgage is made to two or more to secure several debts the mortgagees become tenants in common, *Brown v. Bates*, 55 Me. 520; *Burnett v. Pratt*, 22 Pick. 556; and even where a mortgage to secure debts gives rise to a joint tenancy, see *Appleton v. Boyd*, 7 Mass. 131; *Webster v. Vandeventer*, 6 Gray, 428, yet after a foreclosure the mortgagees will be seized as tenants in common, *Goodwin v. Richardson*, 11 Mass. 469. Where one purchases the share of a tenant in common, or of a joint tenant, he becomes tenant in common with the remaining tenant, *Herbert v. Odlin*, 40 N. H. 267; and the mortgagee of an undivided share becomes likewise a tenant in common, *Shepard v. Richards*, 2 Gray, 424.

Estate in Common Arising from Equally Good Titles.

Where two persons hold by equally good titles, that is where each one holds by a title which would be good for the entire tract claimed, were it not for the other's title, and both have possession, a tenancy in common is held to arise, *Shove v. Dow*, 13 Mass. 529. This position is well presented by the case of *Challefoux v. DuCharme*, 8 Wisc. 287. An Act of Congress provided that every person who, on July 1, 1812, occupied and cultivated a tract of land, or occupied a tract which he had previously cultivated, might claim the same as his property. Under this Act Challefoux filed a claim for lot No. 27—DuCharme filed a claim for the same lot. The commissioners appointed to pass upon such claims decided in favor of both claims, and in 1828 Congress confirmed the claims "purporting to be confirmed or recommended for confirmation by the commissioners." The court held that the decision of the commissioners was final and that, as both claims had been confirmed, the claimants became tenants in common. See, also, *Tubbs v. Lynch*, 4 Harring. 521, a not very clearly reported case.

When two take by simultaneous deeds, which are simultaneously recorded, *Ferris v. Mosher*, 27 Verm. 218; or under synchronous grants, surveyed and registered the same day, purporting to be upon warrants bearing the same date, see *Young v. DeBruhl*, 11 Rich. 638; or under simultaneous levies, *Wiswell v. Wilkins*, 5 Verm. 87; *Wilkins v. Beurton*, Id. 76, they will hold as tenants in common the land to which they have equal claim.

Mere confusion of title, however, will not create a tenancy in common; thus, where warrants were issued to John Menough for three hundred acres and to William Menough for two hundred acres, and a survey was made upon both warrants of a tract as an undivided whole, it was held that a tenancy in common did not arise, for the original grants were in severalty, and the imperfection of the survey could not change the estate, *Ross v. McJunkin*, 14 S. & R. 364.

Agreement to Share Expense of Purchase of Land—Joint Purchase.

When two or more agree to share the expense of purchasing land, a purchase made in pursuance of the agreement will enure as a tenancy in common, *Farrand v. Gleason*, 56 Verm. 633; so such estate will arise where several persons, not being partners, buy land without any specific agreement as to how it is to be held and the land is not bought for resale as merchandise, *Abertheny v. Smith*, 57 Ala. 359; and land purchased jointly for purposes of trade, but not with partnership funds, is held in common, *Deloney v. Hutcheson*, 2 Rand. 183; and even where land is bought with partnership funds and for partnership purposes, if the title be taken to the partners as tenants in common, such tenancy will be fixed upon the land, and will bind subsequent creditors, *Ebbert's Appeal*, 70 Pa. St. 79; *Appeal of Second National Bank of Titusville*, 83 Id. 203.

When several redeem land sold under a judgment at law, they become tenants in common in shares proportioned to the amount of the redemption money advanced by each, *Hoffman et al. v. Lyons et al.*, 5 Lea, 377.

Joint Estate Converted to Tenancy in Common through the Incapacity of one of the Grantees.

If a grant be made to two persons in terms which imply a joint tenancy, but such an estate cannot vest on account of the incapacity of one of the grantees to take as a joint tenant—as where there is a grant to two, one of whom is a corporation—an estate in common will be taken, *De Witt v. City of San Francisco*, 2 Cal. 289; and see 2 Crabb R. P. 627, § 2316; for while a corporation cannot be a joint tenant it may be a tenant in common, *De Witt v. City of San Francisco, supra*; *Hackett v. Multnomah Railway Co.*, 12 Ore. 124.

Widow whose Dower has not been Assigned not Tenant in Common except in Certain States.

A widow whose dower has not been assigned is not, at common law, and in many of the United States, a tenant in common with the heirs, see cases cited, Vol. I. pp. 391, 392, and, in addition, *Grossman v. Lauber*, 29 Ind. 618; *Hull v. Hull*, 26 W. Va. 1; but the law is held otherwise in New York, under the Revised Statutes, *Knolls v. Barnhart*, 71 N. Y. 474; Connecticut, *Stedman v. Fortune*, 5 Conn. 462; *Wosster v. Hunto, & Lyman Iron Co.*, 38 Id. 266; Missouri, *Stokes v. McAllister*, 2 Mo. 163; Michigan, *Proctor v. Bigelow*, 38 Mich. 282; *Moody v. Seaman*, 46 Id. 74.

Tenancy in Common by Prescription or User.

A tenancy in common may arise by prescription, Litt. Sect. 310, or from user, thus in *Trauger v. Sassaman*, 14 Pa. St. 514, two congregations, worshipping in the same church, used a certain place, for the purpose of hitching the horses of those who came to the services, for over twenty-one years; one Pearson also used the same ground; it was held that a tenancy in common had arisen and that the representative of Pearson had no right to inclose the ground so as to deprive either of the congregations of its use.

Common Boundary.

Adjoining owners are tenants in common of a common boundary, *Gibson v. Vaughan*, 2 Baily, 389, and therefore neither owner can maintain trespass against the other for its removal, Id.; and where a tree stands on the line between two properties, the owners of the properties are tenants in common of the tree, *Griffin v. Bixby*, 12 N. H. 454; and so are they of a partition fence, when there is no agreement or proceeding vesting a particular part in each adjoining owner, *Smith v. Johnson*, 76 Pa. St. 191; *Walker v. Watrous*, 8 Ala. 493; *Sayles v. Bemis*, 67 Wis. 315. Mr. Freeman suggests that naturally one would expect the law with reference to a party-wall to be the same as with reference to a tree grown on the boundary line, Freeman, Coten. & Part. § 98, but he admits that the law is held otherwise, and the rule may be stated to be, that a tenancy in common in a party-wall will be held to exist only where there is no evidence of several ownership of the ground upon which it stands, but where such several ownership appears the wall will belong in severalty to the adjoining proprietor, the title of each extending to the dividing line of the properties, *Eno v. Del Vecchio*, 4 Duer, 53; *Andrae v. Haseltine* (Supreme

Court of Wisconsin), 17 N. W. Rep. 18; *Brooks v. Curtis*, 50 N. Y. 699; *Hendricks v. Stark*, 37 Id. 106.

Tenants in Common of Land not Necessarily Tenants in Common of Crop.

A tenant in common of land is not necessarily tenant in common of a crop raised thereon by another cotenant, *Creed v. The People*, 81 Ill. 565. As to tenancy in common of crops where the title to the land is in one of the crop owners only, see, on the subject of tenancy in common of crops, *ante*, Vol. II. pp. 227-236.

No Tenancy in Common when a Building is Erected by Two on the Land of One.

Where two persons build, at joint expense, a building on the land of one of the two, with an agreement for joint occupancy, there will be no tenancy in common of the building, but the title will follow that of the soil, *Benedict v. Benedict*, 6 Day, 464; *McAdam v. Orr*, 4 W. & S. 550.

Tenancy in Common in Water Right.

There may be a tenancy in common in a water right, and where different persons appropriate water for irrigation and for domestic purposes, under general regulations prescribed by water commissioners as to the time and manner of appropriations, they are held tenants in common, *Lytle Creek Water Co. v. Perdew*, 65 Cal. 445.

Tenancy in Common may be in a Remainder.

As we have already seen, there may be a cotenancy in any kind of an estate in possession, but there may be also a tenancy in common of a remainder, either vested or contingent, *Miller v. Keegan*, 14 Ind. 502; *Den ex d. Pinkerton v. Laquear*, 4 N. J. Law, 301; and it has been held to exist even in an inchoate right, *Wilkins v. Burton*, 5 Verm. 76.

Cotenancy when one Tenant has Equitable Title only—Mere Possession.

There may be a tenancy in common, at least for the purpose of partition, where one of the cotenants has an equitable title only, *McClanahan's Heirs v. Henderson's Heirs*, 2 A. K. Mar. 388. But it has been held that tenancy in common cannot exist in a mere possession without title

unless all the alleged tenants are in actual possession. Thus in *Lillianskyoldt v. Goss*, 2 Utah, 292, the plaintiff and one Logan attempted to locate land. In January, 1876, the plaintiff chopped some wood, and in May, 1876, he left the premises. In February, 1877, Logan entered on the land, dug a ditch, and made expenditures on the land. In March, 1877, the plaintiff returned, whereupon Logan claimed the entire tract in his own name and sold it to the defendant. The court held that no tenancy in common existed; from this decision, BOREMAN, J., dissented saying: "Here there was unity of possession under the same title, viz., the naked possession; Logan held by no other title nor did plaintiff. Naked possession is a degree of title, although the lowest and most imperfect, 2 Bl. Com. 195. Logan and plaintiff were, therefore, tenants in common, and Logan's possession was, therefore, that of plaintiff, and plaintiff's temporary absence did not affect his right nor could Logan's acts or words defeat it." The weight of reason and law seems to be rather with the dissenting Judge than with the territorial court.

Presumption of Equality of Interest.

While tenants in common may be entitled to the estate in any proportions, *Beardsley v. Knight*, 10 Vt. 185, yet where no proportion is fixed by the instrument creating the estate and it does not otherwise appear that their interests are unequal the presumption is that they hold by equal interests, *Campaw v. Campaw*, 44 Mich. 31; *Baker v. Shepherd*, 37 Ga. 12; *Spiels v. Stark*, 14 Id. 429; the Georgia Code coincides with the common law upon this point, Code (1882), Pt. 2, Tit. V. Ch. vii. § 2301, p. 569; and it is to be remembered that the inequality of interest does not give to the owner of the greater interest any privileges, as to possession, superior to those of the owner of the less interest, so long as the cotenancy continues; hence where two make a joint purchase, they will, unless an agreement providing for a different division be shown, participate equally in the profit, irrespective of whether the payments of the two tenants have been equal or not, *Shiels v. Stark*, *supra*, but the one who has paid more than his just proportion of the price will have a lien for the amount paid by him in excess of his just share, *Rankin v. Black*, 1 Head, 650; *Williams v. Love*, 2 Id. 80; and see *Gee v. Gee*, 2 Sneed, 395, and *Gregg v. Patterson*, 9 W. & S. 197; and the lien will attach to and continue upon his cotenant's share even after partition made and entry by the cotenant or his heirs on the land set out to him in severalty, *Leitch v. Little*, 14 Pa. St. 250; and where the tenant who has paid more than his proportion holds the legal title and the tenant who has paid less than his proportion

has an equitable title, the former cannot be compelled to part with the legal title until he has been paid an amount which will equalize the contributions of the tenants in common, *Williams v. Love, supra*. Where, however, an inequality of interest is fixed between the tenants, this inequality will apply to losses as well as to gains, hence where a portion of the common property is lost, as through the operation of the Statute of Limitations, the loss will be the common loss of the tenants in proportion to their respective interests, *Pipkin v. Allen*, 29 Mo. 229.

Seizin of Tenant in Common.

As the characteristic of a tenancy in common is unity of possession, it follows that each tenant is seized of an undivided portion of the entire estate, not of a distinct part, as a half or a third of the land, but a half or a third of each and every part of the entire estate, *Powell v. Jones*, 72 Ala. 395, and as a further consequence each tenant is entitled to the common possession of the whole of the land, that is to the possession of the whole provided he do not exclude his fellow from a similar possession, *Knox v. Sillway*, 10 Me. 201; *Wood v. Phillips*, 43 N. Y. 152; *Erwin v. Olmstead*, 7 Cow. 229; *Gower v. Quinlan*, 40 Mich. 572; *Campaw v. Campaw*, 44 Id. 31; *Webster v. Calef*, 47 N. H. 289; *Walker v. Teal*, 7 Saw. 39; and a tenant who is debarred by his cotenant may legally acquire possession even by stratagem or stealth, if he can succeed in doing so without a breach of the peace, *Wood v. Phillips*, 43 N. Y. 152. There is no obligation that the occupation shall be joint or that it shall be by each tenant in person, accordingly a tenant may license another person to occupy for him, and such other person cannot be legally expelled by the other cotenant, *McGarrell v. Murphy*, 1 Hilt. 132.

Effect of Character of Cotenancy on Dealings between Cotenants and Strangers.

From the unity of possession and diversity of title flow most of the rights and obligations incident and peculiar to tenancy in common. We shall consider, first, the effect of this unity and diversity on the dealings of the tenants and third persons, and afterwards upon the relations between themselves.

As the possession of one of several tenants in common is the possession of all, *Taylor v. Cox*, 2 B. Mon. 429; *Story v. Saunders*, 8 Humph. 663, his possession must be considered as extending to the whole tract and excluding any constructive adverse possession of a third person, *Cunningham v. Roberson*, 1 Swan, 138; and even where one tenant in common

has been actually turned off the land by a stranger, his right will be saved by the continued possession of his cotenant, *Bernecker v. Miller*, 40 Mo. 473; and from this it follows that the recognition of the title of one cotenant, *qua* tenant in common, will enure to the benefit of all, *Vaughan v. Bacon*, 15 Me. 455; and the possession of one tenant in common will prevent the conveyance of a tenant in common who is not in possession from being champertous, *Patterson v. Nixon*, 79 Ind. 251; *Elliott v. Frakes*, 90 Id. 389; but where one tenant in common is in exclusive possession, and claims adversely to his cotenant, under such circumstances that it is clear that he has renounced his allegiance to his cotenant and holds adversely to him, a conveyance of the tenant out of possession is champertous under the Kentucky Act, *Barret v. Coburn*, 3 Metc. (Ky.) 510; *Wall v. Wayland*, 2 Id. 155.

Joinder and Severance of Cotenants in Actions—Trespass.

As the tenants hold by unity of possession, but by divers titles, they should join in trespass and in all personal actions, and in such as affect or vindicate the common possession merely, but should sever in all actions wherein the title is an essential matter of consideration. Thus, they should join in actions of trespass, or nuisance, *Littleton*, Sec. 315; *Centreville v. Abingdon Turnpike Co. v. Jarrett*, 4 Ind. 215; *Decker v. Livingston*, 15 Johns. 479; *Austin v. Hall*, 13 Id. 286; *Rice v. Hollenbeck*, 19 Barb. 664; *Hill v. Gibbs*, 5 Hill (N. Y.), 56, note; *DePuy v. Strong*, 37 N. Y. 372; *Daniels v. Daniels*, 7 Mass. 135; *Bradley v. Boynton*, 22 Me. 287; *Low v. Mumford*, 14 Johns. 429; *Rich v. Penfield*, 1 Wend. 380; *Gilmore v. Wilbur*, 12 Pick. 120; *Lane v. Dobyns*, 11 Mo. 105; *Winters v. McGhee*, 3 Snead, 128; *May v. Slade*, 26 Tex. 205; some of these cases regard^t the obligation to join as imperative, the rule in this respect being more strict in this country than in England, as said by BRONSON, J., in *Hill v. Gibbs*, "the English cases say they *may*, ours that they *must* join."

They must join on an action for the destruction of title deeds, *Daniels v. Daniels*, 7 Mass. 134; in an action to recover damages for the location of a turnpike, *Centreville & Abingdon Turnpike Co. v. Jarrett*, 4 Ind. 215; and a tenant in common cannot by waiving a tort, and bringing assumpsit, enable himself to maintain an action alone, *Irwin's Adm'r v. Brown's Ex'r*, 35 Pa. St. 331; in the case cited there were three tenants in common, an agent cut down and sold timber and misapplied the price; one cotenant brought assumpsit against the agent; it was held that the action could not be maintained, LOWRIE, C. J., in delivering the opinion of the court said, "To enforce a joint or several duty, we impute a joint or sev-

eral contract, 10 S. & R. 211; 14 Id. 111. Now, whether you treat the defendant's wrong as waste or trespass, his legal liability for it was to the tenants in common jointly, Co. Lit. § 315, Roscoe on Evidence, 665; if the tort be waived, and a constructive contract substituted, it must be a joint one. One cannot by his election of a substitute destroy the primary action to which his cotenants were entitled with him."

Non-joinder—How taken Advantage of.

Non-joinder of a tenant in common must be taken advantage of by plea in abatement, *Winters v. McGhee*, 3 Snead, 128, *Webber v. Merrill*, 34 N. H. 202, *Fell v. Bennett*, 17 W. N. C. 117, for if the plaintiff be allowed to proceed he may recover his proportion of the entire damage inflicted by the defendant, *Winters v. McGhee*, unless the non-joinder be apparent on the pleadings of the plaintiff, in which case the non-joinder can be made of avail by exceptions, *May v. Slade*, 24 Tex. 205; or, we should say, by motion in arrest of judgment, where the old common law practice prevails. In Massachusetts, it has been held, that the fact of non-joinder may be given in evidence under the general issue, *Webster v. Vandeventer*, 6 Gray, 428. This case was, however, one of a joint tenancy, and a different rule might have been held had the case been one of tenancy in common.

Trespass to try Title—Trespass *quare clausum fregit*.

It has been held that a tenant in common may maintain trespass to try title without joining his cotenants, and, it seems, with very good reason, for, while the form of action apparently refers only to an injury to the possession, yet the real object is to settle the title of the particular tenant interested, and that is, properly, to be settled in an action by the person solely interested therein, *Hines v. Trantham*, 27 Ala. 359; *Craig v. Taylor*, 6 B. Mon. 457; *Baker v. Heirs of Chastang*, 18 Ala. 417; *Childers v. Tankersley*, 23 Id. 781; *Grassmeyer v. Beeson*, 18 Tex. 753; *Croft v. Rains*, 10 Id. 520. It has been held in Maine, that a tenant in common in possession may maintain alone trespass *quare clausum fregit* against a stranger, *Jewett v. Whitney*, 43 Me. 242; and it has also been held in the same state that the tenant in common of a meeting-house could maintain trespass for an injury to a pew, *Murray v. Cagill*, 32 Id. 517. Such is also the law in Vermont, *Paine v. Slocum*, 56 Vt. 504.

By statute in Maine it is now provided that tenants in common, coparceners or joint tenants may either join or sever in personal actions for injury to the realty. If one or more sue without the rest, the plaintiff or

plaintiffs are to set forth the names of all the other cotenants, who may, if they desire, become parties to the action subsequently; the plaintiff, in case of suing alone, is to have a recovery for all the damages suffered, but execution for his proper portion only. R. S. (1883), Ch. 95, §§ 18, 19, p. 791. In Connecticut a cotenant may maintain an action in his own name, but the non-joinder of his cotenants may be shown in reduction of damages. Act of 1872, Gen. Laws (1875), Ch. v. Tit. 19, § 8, p. 417.

Action for Rent.

Tenants in common should join in an action for rent, Co. Litt. Sect. 316, 198 b; *Decker v. Livingston*, 15 Johns. 482; *Sherman v. Ballou*, 8 Cow. 304; and see *Price v. Pickett*, 21 Ala. 741; and this, although in a joint lease it be stipulated that the rent shall be payable one-half to each lessor separately, *Wall v. Hinds*, 4 Gray, 256; but where one cotenant makes a lease of his share, then the other cotenant should not be joined in an action on the lease, for the lessee is not his tenant, *Hayden v. Patterson*, 51 Pa. St. 261.

Distress and Avowry.

In a distress and avowry tenants in common should sever, for the right to make a distress depends upon title, which causes the procedure to savor of the realty, *Decker v. Livingston*, 15 Johns. 479; *Dutcher v. Culver*, 24 Minn. 584; but a joint distress is an irregularity within the statute of 11 Geo. II. C. 19, *Dutcher v. Culver*, *supra*; and in *Jones v. Gundrim*, 3 W. & S. 531, where the fact of tenancy in common did not appear upon the lease, the court allowed a joinder; but HUSTON, J., carefully guarded the case from future misapplication, saying: "Let it not be supposed that I say where the lease shows the lessors to be tenants in common they may join in avowry."

Real Actions—Ejectment.

In real actions tenants in common must sue separately, *Hill v. Gibbs*, 5 Hill, 56; *Stevenson v. Cofferin*, 20 N. H. 151; *Doe ex d. Harrison v. Botts*, 4 Bibb, 420; *Covillaud v. Tanner*, 7 Cal. 38; *Briscoe v. McGee*, 2 J. J. Mar. 370; *Hammett v. Blount's Lessee*, 1 Swan, 385; *Watson v. Hill*, 1 McCord, 161; *Mooer v. Bunker*, 29 N. H. 420; *Throckmorton v. Burr*, 5 Cal. 400; *Johnson v. Sepulbeda*, Id. 149; *Rehoboth v. Hunt*, 1 Pick. 224; and they cannot recover in ejectment upon a joint demise, *Doe ex d. Harrison v. Botts*, 4 Bibb, 420; *Taylor's Heirs v. Perkins*, 1

A. K. Mar. 253; *Gaines v. Buford*, 1 Dana, 481; *Innis v. Crawford*, 4 Bibb, 241; *Miller v. Hoy*, Id. 586. This, which is the rule, has been changed by statute in some States, and in others the law has been held to be different. In California the law was changed by statute in 1867, see *Touchard v. Keyes*, 21 Cal. 208; *Goller v. Fett*, 30 Id. 481; and by the Civil Code, § 10384, p. 959, any tenants in common, joint tenants, or coparceners, or any number less than all may jointly or severally commence or defend any civil action or proceeding necessary for the enforcement or protection of their interest in property. In Mississippi, since 1850, it has been held that tenants in common may unite in ejectment, *Corbin v. Cannon*, 31 Miss. 570.

In Connecticut it has been held, since at least as early as 1791, that, notwithstanding the English rule, whose existence the court recognized, tenants in common might, at their pleasure, join or sever in an action of ejectment, *Hillhouse v. Mix*, 1 Root, 246; in North Carolina, the right of tenants in common to sue jointly in ejectment has been recognized, *Doe d. Nixon's Heirs v. Potts*, 1 Hawks, 469, in which case, HENDERSON, J., said: "I deduce that tenants in common may make a joint demise, that is a lease for years, and that it can be truly said that they did demise, that is jointly demise, for having a joint possession, each demises the whole possession as much as joint tenants. It is true they cannot make a joint lease for life, gift in tail, feoffment or conveyance in fee, for they have not a joint title, but a several one; therefore, each possesses his title in severalty, and I can account no otherwise for the uniform decisions on this subject, that tenants in common cannot make a joint demise to try title in ejectment, or that it cannot be described as their demise in pleading, than in this way: That it being established that they cannot make a joint lease for life, gift in tail, a feoffment in fee, 'they' could not make a joint demise for years, without reflecting that in the one case a joint estate must pass to justify the description that they jointly conveyed; whereas the interest which they did pass was a several and not a joint interest, they being in by several titles; but that in a lease for years, only a right to the possession passes, and they have a joint possession, the only unity which connects them with each other. It is to be observed that it is admitted on all hands, even in the very authorities which say that the declaration would be bad, that the interest passes, but that it shall be called in the pleadings a several and not a joint demise." This case was held in *Hoyle v. Stowe*, 2 Dev. Law, 318, not to be in conflict with the rule that a joint demise can be supported only by showing a title in each one of the grantors to demise the whole, RUFFIN, J., saying: "The position, therefore, is not that the title of the plaintiff need not be truly

stated in pleading, but that in cases of tenants in common, their lessee's title is truly stated when it is alleged to be on the joint demise of the lessor." It is also held in North Carolina, that where a demise is laid from two or more tenants in common and it appears that there is another tenant in common, who has not joined in the demise and is not a party to the action, there may be a recovery *pro tanto*, *Den ex d. Bronson v. Paynter*, 4 Dev. & Bat. Law, 393.

In South Carolina, a joint action has been sustained, and it was further held that on the death of one plaintiff this action did not abate, but the death worked a severance, and the surviving plaintiffs could go on and recover according to their interests, *Boyleston v. Cordes*, 4 McCord, 144.

In Vermont tenants in common may join in ejectment, *Paine v. Slocum*, 56 Verm. 504, and the statute, in very broad terms, allows them to join in actions "concerning their common interest," Rev. Laws (1880), Ch. 69, § 1247, p. 284.

In Maine, by statute, "tenants in common, joint tenants, or any number, may join in a suit to recover realty, or one may sue alone," Rev. St. (1883), Ch. 104, § 9, p. 817; and see *Brown v. Bates*, 55 Me. 520. The law in Massachusetts is the same, except that the statute adds to the permission given to one to sue alone the provision that such action is "for his share," Pub. Stat. (1882), Ch. 173, § 7, p. 1018.

In Illinois it is enacted that joint tenants, coparceners or tenants in common may bring ejectment, jointly or severally, for their shares, Rev. Stat. (1883, Hurd), Ch. 45, § 5, p. 496.

In Michigan and Wisconsin joint tenants, heirs or tenants in common may bring joint or several actions for their shares or interests, Michigan, Howell's Annot. Stat. (1882), Tit. 31, Ch. 274, § 7974, p. 1978; Wisconsin Rev. St. (1878), Ch. 138, § 3192, p. 824; and in Nebraska cotenants in common may join or may sue separately, *Mattis v. Boggs*, 19 Neb. 698.

In Ohio it is held that tenants in common may make a joint demise in ejectment, *Lessee of Massie's Heirs v. Long*, 2 Ohio, 287; *Doe d. Wilkinson v. Fleming*, Id. 301.*

* These two cases afford a singular instance of judicial bolstering: in the first, the court, without giving any reason, decides that the case of tenants in common falls within the provision of the fifty-ninth section of the Judicial Act that, in ejectment, "the plaintiff shall have the same benefit from a joint demise that he could from several owners," saying: "We have so settled this term in the case of the *Lessee of Wilkinson v. Fleming* from Butler County." When we turn to the case cited we find the following opinion: "In the case of the *Lessee of Massie's Heirs v. Long and Others*, decided at this term, the court have settled that, under our statute, tenants in com-

In Nevada, ejectment is said to be unknown and all tenants in common may join in an action to recover realty, the reason given being that, in Nevada, mining claims, which constitute a large part of the property in that State, are sometimes owned by hundreds of tenants in common and, therefore, it would seem, that adherence to the old rule would be a cause of great expense and annoyance, *Alford v. Dewine*, 1 Nev. 207.

Effect of Recovery of Undivided Share.

As the titles of tenants in common are distinct, the recovery by one of an *undivided share* will not in any way, whether by stopping the running of the Statute of Limitation or otherwise, be of any service to his co-tenants, *Gilman v. Stetson*, 18 Me. 428; and the disability of one tenant in common will not in any way prevent the running of the statute against another, *Doolittle v. Blakesley*, 4 Day, 265.

Action by One Tenant against Stranger for the Whole Estate.

A tenant in common may alone bring an action against a stranger and claim to recover the whole estate, *Touchard v. Crow*, 20 Cal. 150; *Brown v. Warren*, 16 Nev. 228; *Hart v. Robertson*, 21 Cal. 348; *Stark v. Barrett*, 15 Id. 371; *Williams v. Sutton*, 43 Id. 71; *Smith v. Starkweather*, 5 Day, 210. Where an action is so brought, according to what seems the better rule, the plaintiff can recover only his due proportion of the land sued for, *Watson v. Hill*, 1 McCord, 161; *Den ex d. Godfrey v. Cartwright*, 4 Dev. L. 487; *Overcash v. Kitchie*, 89 N. C. 391; *Holdfast v. Shepard*, 6 Ired. L. 361; *Dawson et ux. v. Mills*, 32 Pa. St. 302; *Young v. Adams*, 14 B. Mon. 127; *Dewey v. Brown*, 2 Pick. 387; *Butrick v. Tilton*, 141 Mass. 93; *Gray v. Givens*, 26 Mo. 291; *Daniel v. Bratton*, 1 Dana, 209 (applied to a case of recovery by the lessee, and overruling *Hume v. Langston*, 6 J. J. Mar. 254); *Boyleston v. Cordes*, 4 McCord, 144; *McFadden v. Haley*, 2 Bay, 457; *Perry v. Middleton*, Id. 539; *Perry v. Walker*, Id. 461; *Perry v. Middleton*, Id. 462; *Mattis v. Boggs* (Supreme Court of Nebraska, November, 1885), 21 Reporter, 243; *Mattis v. Boggs*, 19 Neb. 698, S. C., 22 Reporter, 467; and a verdict for a plaintiff, tenant in common, which does not designate the extent of interest of which a recovery is had, is defective, *Craig v. Taylor*, 6 B. Mon. 457; *Mattis v. Boggs*,

mon may make a joint demise. That decision is decisive of this case." Evidently the court decided both cases at the same term, perhaps at the same consultation, and in each case the Judge who was to write the opinion, depended upon his brother to write one upon the point involved.

supra. The proper practice is to find for the plaintiff for a certain aliquot part or for a number of acres which would be equivalent to such part, *McCraig v. McBride*, 9 Dana, 397; *Dougherty v. Linthicum*, 8 Id. 196; *Daniel v. Bratton*, 1 Id. 209.

But, on the other hand, it has been held that one tenant in common suing alone may recover the entire tract, at least as against a trespasser, *Sowers v. Peterson*, 59 Tex. 216; *Hutchins v. Bacon*, 46 Id. 414; *Croft v. Rains*, 10 Id. 523; *Watrous v. McGrew*, 16 Id. 510; *Grassmyer v. Beeson*, 18 Id. 766; *Read v. Allen*, 56 Id. 176; *Stovall v. Carmichael*, 52 Id. 384; *Presley v. Holmes*, 33 Id. 478; *Contreres v. Haynes*, 61 Id. 103; *Crook v. Vandervoort*, 13 Neb. 505 (but see *Mattis v. Boggs*, 19 Neb. 698); *Treat v. Reilly*, 35 Cal. 129; *Sharon v. Davidson*, 4 Nev. 416; *King v. Bullock*, 9 Dana, 41; *Allen v. Gibson*, 4 Rand. 468; *French v. Edwards*, 5 Sawy. 266; and see *Chesround v. Cunningham*, 3 Blackf. 82; the recovery in such case enuring to the benefit of all the cotenants, *Crook v. Vandervoort*, 13 Neb. 505. But even where allowed to recover the entire tract a cotenant suing alone can recover only his proportion of mesne profits and damages for detention, *Clark v. Huler*, 20 Cal. 196; *Muller v. Boggs*, 25 Id. 175.

Land Taken for Road or Other Public Use.

It was formerly held in Massachusetts that one tenant in common of land over which a highway had been laid out could not apply alone for a jury to assess the damages occasioned thereby, since, if he could do so, the owner of a small proportion of an estate might produce an alteration in the plan of the laying out of a highway, against the wishes and to the prejudice of the principal owners of the tract, the assessment of damages being joint and not severable by the jury, *Merrill v. Inhabitants of Berkshire*, 11 Pick. 269; but this rule has been changed by the Rev. Stat. c. 24, § 48, *Dwight v. County Commissioners*, 7 Cush. 533; and a cotenant may now apply to have damages assessed for land taken for public use, *Id.*

In New York it is held that proceedings by the authorities to take land for public use should be against cotenants separately; *Dyckman v. Mayor, etc.*, 5 N. Y. 434; but if proceedings have been had against the tenants jointly without objection being made and the only objection raised subsequently is the inadequacy of the damages, the objection of joinder will be held waived, *Id.*

Consequences of Distinctness of Title—Notice of Judgment—Release matter affecting one Tenant only.

As consequences of the distinctness of title, which exists notwithstanding the unity of possession, several results follow.

Notice to one cotenant is not notice to all, *Wiswall v. McGown*, 2 Barb. 270; *Parker v. Kane*, 4 Wisc. 1; *Snyder v. Sponable*, 1 Hill, 567; a judgment obtained against one in an action of covenant brought against two cotenants upon articles of sale is not a lien on the share of the cotenant against whom judgment has not been given, see *Arnold v. Cessna*, 25 Pa. St. 34; the acceptance of a surrender of a particular estate by one tenant in common will not bind his cotenant, *Appeal of Mellon et al.*, 33 Leg. Int. 464; and when lands have been sold for taxes the release by one tenant in common of the entire bond given for the surplus by the purchaser at the tax sale will be effective only to the extent of the releasor's interest, and will not be available as against his cotenant, *Petrikin v. Myton*, 14 W. N. C. 71; and where tenants in common have agreed to sell land and, in the agreement, a time is fixed for the payment of the price, which time has gone by, the vendee cannot by paying the price to one of the cotenants, who receives it without the consent of his companions, revive the right to a conveyance which has become forfeited, *Pearis v. Covillaud*, 6 Cal. 617. It is also held that where a property by its use becomes a nuisance, a tenant in common, who does not actually occupy the premises, is not liable for damages resulting from the nuisance, *Simpson v. Seavey*, 8 Me. 138.

Agency of Cotenant not Presumed.

No agency can be presumed, from the mere relation of tenancy in common, which will enable one tenant to bind another with reference to the title by an estoppel in favor of a stranger; thus the misrepresentations of a tenant in common estop himself only; they will not estop his fellow, even if the subject of the misrepresentation be property which is jointly conveyed, *Dexter Lime Rock Co. v. Dexter*, 6 R. I. 353; and the act of some of the cotenants in locating a grant in common will not affect the other cotenants who have not participated or acquiesced in such location, *Jackson ex d. Erwin v. Moore*, 6 Cow. 706 (this case was reversed in 4 Wend. 58, but on another point); but there may be such an open course of dealing between the tenants in common as to raise the inference of agency on the part of one; and this is especially the case where the tenancy is of land the title to which has not become fully vested; thus in *Lessee of McKnight v. Yingland*, 2 Binn. 61, R. Neave

and R. Neave, Jr., as tenants in common, took up a warrant of land in Pennsylvania; the latter lived in Pennsylvania, was the actual owner and attended to everything in connection with the land; the former lived in England; before a survey had been made, R. Neave, Jr., relinquished all right to the land to a third person; it was held that the relinquishment bound both tenants in common.

Statute of Limitations.

Where the bar of the Statute of Limitations has attached as against one tenant in common, it will not be available as a bar against his cotenants who may have been under disability, or against whom for any other reason the bar of the statute would not have run had they held in severalty, *McFarland v. Stone*, 17 Verm. 165; *Hicks v. Rogers*, 4 Cr. 165; *Root v. McFerrin*, 37 Miss. 17; but, on the same principle, the disability of one cotenant will not be of any avail to stop the running of the statute against another cotenant, *Johnson v. Harris*, 5 Hayw. 113; and the fact of tenancy in common will not in any way interfere with the effect of the statute in favor of a tenant in common or joint tenant as against a third person, and it will run in favor of such tenant as effectively as though a severance had been had, *Burleson v. Burleson*, 28 Tex. 383.

Where Rights Arise from Possession or Dealing with Land the Action of one Cotenant may bind another.

Where the rights of action or otherwise of third persons arise from the dealing by a tenant in common with the possession, or where the right of tenants in common with reference to third persons arises from the right of possession, there the action of one cotenant may, as against a third person, bind his fellows, thus, as one tenant in common may make a verbal lease of the land held in common, *Rising v. Stannard*, 17 Mass. 282, a payment of rent to one tenant in common is a good defence to an action brought to recover rent, whether the lease be in form joint or several, *Decker v. Livingston*, 15 Johns. 479; *Grossman v. Lauber*, 29 Ind. 619; *Griffin v. Clark*, 33 Barb. 46; or to an action for use and occupation brought by a tenant in common who has not joined in the lease under which the defendant has held the land, *Grossman v. Lauber*, *supra*; or to an action for waste, *Id.*; but this is to be taken with the qualification that if a tenant in common notify the lessee not to pay to the other tenant in common, then a subsequent payment, made in disregard of such notice, will not operate as a discharge from liability, *Harrison v. Barnby*, 5 T. R. 249; *Decker v. Livingston*, *supra*; but in *Brown v. Wellington*, 106

Mass. 318, it was held that the purchaser of standing grass from one cotenant had no right to refuse to pay to the vendor the contract price on the ground that, after he had cut and removed it, the other cotenant forbade him to pay for it; for the cotenant had the right to sell the product of the land, subject to his liability to account.

So a release by one tenant in common is a good defence to an action for trespass, *Decker v. Livingston, supra*; but it seems that where one cotenant has brought an action of trespass *quare clausum fregit*, and the other, after action brought, executes a release to the defendant, the only effect of the release will be to confine the damages recoverable by the plaintiff to an amount proportioned to his share of the property injured, *Wilson v. Gamble*, 9 N. H. 74.

Cotenant as Witness.

The effect of the distinctness of the characters of the tenants in common has been pressed so far, that, even before the general removal of the disqualification of witnesses on account of interest, it had been held that one tenant in common could be a witness for another in an action to recover the land claimed in common, *Hammett v. Blount's Lessee*, 1 Swan, 385; but the general and better rule was otherwise when there was a claim to recover on a common title, *Barrett v. French*, 1 Conn. 354; for in such case the witness is directly interested in the event of the suit; and in *Den ex d. Rogers v. Mabe*, 4 Dev. Law, 180, where an action was brought against a tenant in common in possession to recover the entire tract, it was held error to admit a cotenant as a witness for the defence, RUFFIN, C. J., saying: "The ground upon which the Judge admitted the witness is that he was not a party to the suit. But there are many cases in which persons not parties in ejectment are not competent witnesses. He who is bound to a warranty to one of the parties cannot be a witness in support of the title he is to make good. Nor can a landlord testify for his tenant; nor, we think, one tenant in common for another. They are all interested in the event of the suit, not barely in the question. The possession of the defendant is *prima facie* that of the witness, and the recovery in the action would change the possession and put out the person upon whom the witness has a right to call for an account as his bailiff. For this reason alone we think that the judgment must be reversed, and a new trial ordered."

Tenants in Common of Premises not Tenants in Common of a Business carried on thereon.

As ownership of premises will not give an interest in a business carried on upon the premises, so it will not give an interest in anything purchased for use thereon; accordingly we find it held that a tenant in common of a mill in which other tenants in common carried on a manufacturing business is not liable for the price of a steam engine ordered by the others, *Thurston v. Horton*, 16 Gray, 274.

Rights of Tenants in Common as between Themselves—Conveyance by Tenant in Common.

The first consequence of the character of the holding in an estate in common upon the tenants, as between themselves, that we shall notice is that the tenant in common is incapacitated from making any conveyance which will prejudice the interest of his cotenant, *Stark v. Barrett*, 15 Cal. 361; *Buchanan v. King's Heirs*, 22 Gratt. 414; *Jeffers v. Radcliff*, 10 N. H. 242; *Bigelow v. Topliff*, 25 Verm. 273. He may, indeed, convey his own undivided interest, for that is as much under his control as an estate in severalty would be; *Burghardt v. Turner*, 12 Pick. 534; *Staples v. Bradley*, 23 Conn. 167; *Stark v. Barrett*, *supra*; and that whether his share be of an estate in possession or in remainder; *Coleman v. Lane*, 26 Ga. 515; and his grantee will become a tenant in common with the remaining tenant; but, as he cannot directly, without the assent of his cotenants, apportionate to himself any particular given portion of the land held in common, *Cox v. M'Mullin*, 14 Gratt. 82, so he cannot do the same thing, in effect, by conveying a portion of the land by metes and bounds so as to affect his cotenant, *Boggess v. Meredith*, 16 W. Va. 1; *Robinett v. Preston*, 2 Rob. (Va.) 278; *Gates v. Salmon*, 35 Cal. 588; *Sutter v. San Francisco*, 36 Id. 115; *Prentiss's Case*, 7 Ohio, 473; *Treon v. Emerick*, 6 Id. 391; *Dennison v. Foster*, 9 Id. 126; *Dall v. Brown*, 5 Cush. 291; *Ballou v. Hale*, 47 N. H. 347; *Jeffers v. Radcliff*, 10 Id. 246; *Great Falls Co. v. Worster*, 15 Id. 449; *Dorn v. Dunham*, 24 Tex. 366; *Good v. Coombs*, 28 Id. 34; *Mattox v. Hightshue*, 39 Ind. 95; and while his conveyance will so far estop himself, that if, on partition being made, the portion he has conveyed falls to him, his grantee can hold the said portion; *Varnum v. Abbot*, 12 Mass. 474; *Cox v. M'Mullin*, 14 Gratt. 82; *M'Kee v. Barley*, 11 Id. 343; *Buchanan v. King's Heirs*, 22 Id. 414; *Ballou v. Hale*, 47 N. H. 347; *M'Key's Heirs v. Welch's Ex'rs*, 22 Tex. 390; *Dorn v. Dunham*, 24 Id. 366; yet the grantee takes subject to the risk of loss if the land should not be so divided as to give

him the portion conveyed, *Stark v. Barrett*, 15 Cal. 361; *Jewett's Lessee v. Stockton*, 3 Yerg. 492. The syllabus and opinion in the case last cited are misleading, the former saying that a tenant in common cannot convey his interest in a particular part of the land held in common by metes and bounds. The case does not, however, so decide, although the opinion propounds it as the question for decision, for the facts of the case called for no such decision. The conveyance, under consideration by the Court, was of twenty-five acres, not of the grantor's interest therein, and on partition the twenty-five acres were not assigned to the grantee; it was held that he had no title. The interests of the grantee will, however, be so far regarded by a court, in making partition, that, if it can be done without injury to the other cotenants of the grantor in the entire tract, the part conveyed will be assigned to the purchaser, thus making his title perfect, *M'Kee v. Barley*, 11 Gratt. 346; *Campau v. Godfrey*, 18 Mich. 38; *Dorn v. Dunham*, 24 Tex. 376; *Worthington v. Staunton*, 16 W. Va. 208; *Arnold v. Cauble*, 49 Tex. 533; *Camoron v. Thurmond*, 56 Id. 22.

Conveyance by Metes and Bounds Voidable.

The law is sometimes said to be that a conveyance by metes and bounds by a tenant in common is "void" or "void against the cotenant," and into this form of expression the Courts in several cases have fallen, *Griswold v. Johnson*, 5 Conn. 363; *Hinman v. Leavenworth*, 2 Id. 244, note; *Starr v. Leavitt*, Id. 243; *Mitchell v. Hazen*, 4 Id. 495; *Bartlet v. Harlow*, 12 Mass. 348; *Porter v. Hill*, 9 Id. 34 (this last is a case of joint tenancy, but as there is nothing to prevent a joint tenant conveying his share and so severing the jointure, the same principle, it would seem, should apply as to a conveyance by metes and bounds in a case of joint tenancy as in a case of tenancy in common); and see Freeman, Coten. and Part. § 199. The case of *Porter v. Hill*, which seems to be the leading authority for the position just stated, has been the subject of severe criticism, see, amongst other cases, *Butler v. Roys*, 25 Mich. 53; *Gates v. Salmon*, 35 Cal. 576; and the better rule seems to be that the conveyance is one which is voidable only at the will of the other tenants in common, for the non-conveying tenant in common can ratify and confirm the acts of his cotenant by a suitable conveyance, *Great Falls Co. v. Worster*, 15 N. H. 412; *Whitton v. Whitton*, 38 Id. 127; *Nichols v. Smith*, 22 Pick. 316; *Marsh v. Holley*, 42 Conn. 433; *Hartford & Salisbury Ore Co. v. Miller*, 41 Conn. 112; *Reed v. Spicer*, 27 Cal. 57; and it has been held a release will have that effect, *Johnson v. Stevens*, 7 Cush. 431.

The earlier cases in Connecticut, cited *supra*, were to the effect that a conveyance by a tenant in common was void; but this doctrine has been abandoned in that State in the comparatively recent case of *Goodwin v. Keney*, 49 Conn. 563, decided in 1882, in which CARPENTER, J., said: "The doctrine of the earlier cases in this State, contrary to the doctrine which prevails elsewhere, was that such deeds were null and void. See cases cited and commented on in *Hartford and Salisbury Ore Co. v. Miller*, 41 Conn. 112. In that case we materially modified that doctrine by holding that such a deed was not void, but, having been confirmed by deed by the other tenants, was valid. The rule in that case, however, should not be interpreted as requiring that the confirming act should in all cases be by deed. . . . We intended simply to hold that if the cotenants by deed ratified the conveyance it was good and not void. We there said 'their assent, expressed by deed or in some other proper manner, seems to be required.'"

The question has been very carefully considered in the case of *Washington v. Staunton*, 16 W. Va. 208, in which JOHNSON, J., in delivering the opinion of the court, after a learned, critical, and extensive review of the authorities, thus states the rule: "A deed from a cotenant of a part of the land held in common, describing it by metes and bounds, cannot in any way operate to the prejudice of the other tenants in common; they have the right to have the land partitioned, unaffected by such deed. But in partition in such case a court of equity will allot the portion so conveyed by metes and bounds to the purchaser thereof, if it can be done without prejudice to the rights of the other cotenants. Such deed will become operative and pass to the purchasers of such lands by metes and bounds if the other tenants in common, before partition, confirm and ratify it, and after partition if that portion is allotted to the purchaser; and in either case the deed will be binding on both the grantor and grantee." The learned Judge then goes on to state that in the case of a conveyance by metes and bounds with warranty and the subsequent failure of title as to a material part of the land conveyed through a partition, equity would, upon the prayer of the purchaser, annul the deed and leave the parties thereto *in statu quo*.

In order to avoid the deed it is not necessary for the cotenant in common of the grantor to make prompt objection, as his silence is not held to imply consent to the deed, *Great Falls Company v. Worster*, 15 N. H. 412; and he is not obliged to give notice of disaffirmance of the deed to the grantee, as said in *Duncan v. Sylvester*, 24 Me. 482, by SHEPLEY, J.: "If he were, he might become a trespasser before he was aware of the existence of such a conveyance. He may entirely disregard it and pro-

ceed to occupy any portion of the estate as freely as before such a conveyance, because it can have no legal effect upon his right."

It has been held that until objection is made, or dissent is manifested, the grantee will hold as a cotenant of the estate, to the extent of the interest conveyed, *Robinett v. Preston*, 2 Rob. 278; but this must be taken *sub modo* only, or as limited to the cotenancy in the part conveyed by metes and bounds, for the law will not go so far in its desire to give effect, as far as possible, to the wishes of parties to conveyances as to hold that a deed which expressly gives certain land by metes and bounds vests an undivided share in the whole estate in the grantee, *Soutter v. Porter*, 27 Me. 405.

Effect of Conveyance by Metes and Bounds or of the whole Estate in Severalty.

It has been held that a deed conveying land in severalty by metes and bounds will be good to pass the undivided interest of the tenant in common in the tract specified, *Lessee of White v. Sayre*, 2 Ohio, 111; *Dennison v. Foster*, 9 Id. 126; but this position seems open to the objection that it gives to the deed an effect it was not intended to have, and also to the same objection which lies to a conveyance of the undivided share in a specified portion which is noted below. The same objection does not lie against holding that where a cotenant has assumed to convey the whole tract his deed will convey the grantor's interest, *Morelock v. Bernard*, 15 Lea, 169.

Conveyance of Undivided Share in Specified Portion.

The same rule which prevents the grant or conveyance by a cotenant of a part of the estate by metes and bounds is held to apply to the conveyance of an undivided share in certain specified parts of the land, for, if permitted, it would deprive the other cotenant of the possibility of having the whole of that particular portion assigned to him on partition being made, *Crocker v. Tiffany*, 9 R. I. 505; *Peabody v. Minot*, 24 Pick. 329; *Blossom v. Brightman*, 21 Id. 285; *Whitton v. Whitton*, 38 N. H. 127; but there are cases which hold that a tenant in common may convey his interest in any particular portion or parcel of the land, *Reinicker v. Smith*, 2 H. & J. 421; *Primm v. Walker*, 38 Mo. 94. The rule laid down in these authorities should be confined to cases in which the parcel of which the undivided share is conveyed is distinct and separate from and not necessarily dependent upon or connected with the rest of the estate, considered as a whole, and if so confined it seems reasonable and proper, for where lands have been dealt with by the tenants in common as separate

parcels, or, indeed, as separate estates for some purposes, there would seem to be no injustice worked by allowing them to be so treated for purposes of conveyance, while if they are so connected with the rest of the property as to make a not readily devisable whole, a very different result would follow. This view is sustained by the opinion of the court in *Butler v. Roys*, 25 Mich. 53, and the facts of the case of *Primm v. Walker* bring it within the modification we have suggested, although the opinion may seem to go farther and to uphold the unqualified right to convey an undivided share of a specified portion of the estate in common.

Rule in Missouri.

Before leaving the subject of conveyance by metes and bounds, it is to be noticed that the law in Missouri differs from that of the rest of the United States, and it is there held that a conveyance by metes and bounds made by a tenant in common is good even as against his cotenant, provided he do not convey an extent of land greater than his share would amount to, *Barnhart v. Campbell*, 50 Mo. 597.

Doctrine of Conveyance applied to Dedication and Condemnation to Public Use.

The doctrine which governs the conveyance of a tenant in common applies to cases of dedication to public use; a dedication to public use by one tenant in common without the assent of his cotenant is invalid, *Scott v. The State*, 1 Sneed, 629; and it has been contended that the same principle should apply in cases of condemnation to public use. In *Stevens v. The Town of Norfolk*, 46 Conn. 227, J. H. Stevens and L. P. Stevens were seized in common of certain land, which the town defendant desired to condemn for public use, it accordingly instituted and carried through proceedings, against J. H. Stevens in 1872 and against L. P. Stevens in 1876. The plaintiff, J. H. Stevens, took the position that proceedings in severalty against the different tenants could vest no title in the town, citing in support thereof the cases deciding that one tenant in common could not sell, convey or incumber any portion of the estate by metes and bounds. LOOMIS, J., in delivering the opinion of the court, after recognizing the rule as stated in the authorities, and giving the reason thereof, said: "In the light of this reason, and of the principle that each tenant's deed is good and effectual against himself, it will be seen that if all the tenants in common give deeds at separate times of their respective interests in the same portion of the joint estate by metes and bounds to the same person, the title must of necessity be good against them all. Now it is

conceded by the petitioners that we may apply the principles drawn from the analogy of deeds to the proceedings to take land for public use, and so we may regard the several proceedings as compulsory conveyances in each case and give the same effect to them as to so many separate deeds. We, therefore, conclude, that the proceedings first had against J. H. Stevens, as against himself, took all his right, title, and interest in the whole tract, which was, however, inoperative against the other two tenants; but when by subsequent proceedings against them all their right, title and interest in the whole of the same tract was in like manner taken, the proceedings were no longer inoperative against any of the petitioners and the title became perfect in the town against them all." The court in this case seems to recognize the applicability of the principle contended for, but in a case decided not long after, the same court abandoned this position. In that case, *Stevens v. Battell*, 49 Conn. 156, which was an action of trespass, brought by the L. P. Stevens of the former case, against an agent of the town for an entry and removal of a fence made after the proceedings had against J. H. Stevens and before those against the plaintiff, the court said: "In *Stevens v. Town of Norfolk*, 46 Conn. 227, the question was, whether by the two proceedings the town had accomplished that object [*i. e.*, the acquirement of title]. The court held that it had. Conceding the petitioner's claim that the principle governing voluntary deeds by tenants in common applied to the case, the court came logically to the conclusion that the result was a complete title in the town. The question now arises, whether that principle applies and whether the town, by the proceedings against J. H. Stevens and before the proceedings against the plaintiff, acquired any interest in the land for any purpose. With some hesitation we have come to the conclusion that, inasmuch as it was a proceeding *in rem*, the land itself being condemned and taken for a public use, the town thereby acquired all the rights of J. H. Stevens, and became practically a tenant in common with him. The reasons underlying the principle, as given by LOOMIS, J., in *Stevens v. Town of Norfolk*, make it evident that the principle does not properly apply to a proceeding *in rem* to condemn land for a public use."

Tenant in Common Conveying his Undivided Share cannot Convey with a Reservation.

While, as we have seen, a tenant in common may convey his undivided share of the property held in common, yet he cannot convey it with all the freedom of an owner in severalty, for he cannot convey with a reservation of a part thereof. This question was considered in *Adam v. Briggs*

Iron Co., 7 Cush. 361, where a tenant in common attempted to convey his share of certain land, reserving ore rights. The court held that such a conveyance could not be sustained as against the cotenant; SHAW, C. J., saying: "We have seen that it is competent for a general owner not only to divide his estate by metes and bounds and convey one parcel to one and one to another, but also to divide it in another mode by conveying mines to one and quarries to another and retain a general interest in the soil; and these special estates, when thus legally severed, may pass to heirs, devisees, and purchasers, and be attended with all the incidents, and be governed by the common rules applicable to the holding of real estate. But if the owner of an undivided part of a real estate could do this, it would be attended with all the inconvenience to the cotenant arising from a conveyance of his interest in a particular part by metes and bounds. The same reasons upon which it is held that such a conveyance is void against cotenants will also avoid the act of a part owner in attempting to parcel out rights, in their nature indivisible, in definite portions of the inheritance, as the mines to one and the general estate to another."

The rule prohibiting the conveyance of a several interest in property held in common does not apply to a case of tenancy in common of a water right; accordingly where two who were tenants in common of a water right with another conveyed to a third person "so much water as shall be necessary to run" certain mills, the conveyance was upheld, in the face of the contention that it was void as conveying an interest in severalty, the court saying: "The right conveyed was a limited right to use water. The grantors, even if they were tenants in common, clearly had some right to use the water; while they were using it the plaintiff, of course, would have the benefit of it. A grant of the right to use the water when the grantors were not using it is not void on the ground that it impairs the rights of cotenants. The principle contended for has no application to the use of water," *Adams v. Manning*, 51 Conn. 5.

Lease by Cotenant—Entry of Third Person by License.

A cotenant may demise his undivided share, and reserve a rent therefor and recover it, *Hayden v. Patterson*, 51 Pa. St. 261; but if he make a lease of a distinct part of the land, it is inoperative as against his cotenant, *Shephadson v. Rowland*, 28 Wisc. 108; for one cotenant cannot bind the other by an agreement as to the possession of land, *Stookey v. Carter*, 92 Ill. 129; and in a lease of the whole of the land all the tenants in common must join, or it will be inoperative as to those who have not joined in or consented thereto, *Tainter v. Cole*, 120 Mass. 162; *Mussay v. Holt*, 24

N. H. 248; *Vaughan v. Cravens*, 1 Head, 108; *McKinley v. Peters*, 111 Pa. St. 283; but as the right of occupation of each tenant in common extends to the entire lot and as he is not bound to occupy in person, one who enters by the license of one tenant in common cannot be treated by another as a trespasser, *Bucknam v. Bucknam*, 30 Me. 494; *Ord v. Chester*, 18 Cal. 77; and occupation after entry by such license will be considered as by the authority thereof, until by proof of the revocation of the license, or otherwise, it is shown that such is not the case, *Bucknam v. Bucknam, supra*.

Mortgage by Cotenant.

A tenant in common may mortgage his interest, *Ruppe v. Steinbach*, 48 Mich. 465; but his mortgage of an undivided interest in a specific part is invalid as against his cotenant, *Marks v. Sewall*, 120 Mass. 174. This last rule, we think, should be taken subject to the same modification as that which applies to the conveyance of an undivided interest in a specified, separate, and distinct tract. (See page 74.) And if a tenant in common mortgage the whole of the common property, while the mortgage will bind his interest, yet his cotenant will be so far protected that on partition and account the claim of the cotenant for profits arising from the exclusive occupancy of the mortgagor, will take precedence of the mortgage, *Hines v. Munnerlyn*, 57 Ga. 32; *Arnett v. Munnerlyn*, 71 Id. 14.

Incumbrance—Subjection of Common Estate to Servitude.

A tenant in common cannot incumber the estate or subject it to a servitude by which the rights of his cotenant will be affected, *Hutchinson v. Chase*, 39 Me. 508; *St. Paul's Church v. Ford*, 34 Barb. 16; and this rule will prevent the reservation of a right of way by a tenant in common in selling his share, see *Marshall v. Trumbull*, 28 Conn. 183, in which case it was given as an additional reason for the decision, that the reserved right would be exercisable upon a specific part of the ground.

Acquirement of Homestead in Common Estate.

As a further consequence of the unity of possession neither cotenant can, during the existence of the tenancy in common, acquire a homestead, for, if such acquisition were permitted, it would destroy the cotenancy so far as regarded the land set aside as homestead, *Wolf v. Fleischacker*, 5 Cal. 244; *Reynolds v. Pixley*, 6 Id. 165; *Seaton v. Son*, 32 Cal. 481; *Thurston v. Maddock*, 6 Allen, 427; *Howes v. Burt*, 130

Mass. 368; *Cameto v. Dupuy*, 47 Cal. 79; *First National Bank of Santa Barbara v. La Guerra*, 61 Cal. 109; *West v. Ward*, 26 Wisc. 579; *Avans v. Everett*, 3 Lea, 76; *Terry v. Berry*, 13 Nev. 514; *Greig v. Easlin*, 30 La. Ann., Pt. 2, 1130. But in several of the States a homestead may be acquired by a tenant in common, subject to the rights of his cotenant. Thus in Iowa it is held that a homestead may be held in an undivided interest, but the right cannot be claimed and enforced to the detriment of cotenants, hence if a tenant in common has erected a homestead on land which cannot be partitioned without injury to his cotenants, and an execution is levied against a cotenant, the homestead will have to be sold, but the court, in distributing the proceeds of the sale, will see that the value of the homestead and improvement, as distinguished from that of the land, is secured to the person at whose expense and by whose labor they have been made, *Thorn v. Thorn*, 14 Iowa, 49. In Texas it is also held that a tenant in common may acquire a homestead, to be set out to him on partition, if it can be done without injury to his cotenants, *Clements v. Lacy*, 51 Tex. 150; *Morgan v. Estate of Morgan*, 1 Posey, 400; and in the following States an estate in common will support a claim of homestead: Alabama Code (1876), § 2820; *McGuire v. Van Pelt*, 55 Ala. 344; *Snedecor v. Freeman*, 71 Id. 140; Arkansas, *Greenwood v. Maddox*, 27 Ark. 648; Kansas, *Tarrants v. Swain*, 15 Kan. 146; Michigan, *Lozo v. Sutherland*, 38 Mich. 168; Minnesota, *Kaser v. Haas*, 27 Minn. 406; Mississippi, *McGrath v. Sinclair*, 55 Miss. 89; New Hampshire, *Horn v. Tufts*, 39 N. H. 478; Vermont, *McClay v. Bixby*, 36 Vt. 254; and it may be noted that in California, by the Act of 1868, a homestead may be acquired in lands held in joint tenancy or in common, where the person filing the declaration is in exclusive possession of the tract sought to be dedicated as a homestead. See *Cameto v. Dupuy* and *First National Bank of Santa Barbara v. La Guerra*, *supra*.

Tenant in Common cannot acquire Easement over the Common Property.

When one tenant in common also owns a tenement in severalty, he cannot, while the cotenancy continues, acquire by user an easement over, or in, the common property, for his use will be referred to his higher title of ownership; thus, if one tenant own a lot in the rear of the common property he cannot acquire a right of way in or over it, for he cannot have an adverse possession of the way, *Boyd v. Hand*, 65 Ga. 468; and see *Great Falls Co. v. Worster*, 15 N. H. 412, in which it is held that a tenant in common has no right to flow the common property by means of

a dam erected on land of which he is the sole owner; and see, also, *May v. Parker*, 12 Pick. 34.

Insurance by Tenant in Common.

As a result of the distinctness of title, notwithstanding the unity of possession, a tenant in common may insure his own interest in the common property and, in case of a loss, may recover and retain the entire insurance money, *Harvey v. Cherry*, 76 N. Y. 436; and see *Lawrence v. Van Horne*, 1 Caines, 276; *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Sm. 268.

Effect of Distinctness of Title and Unity of Possession.

The results of both the distinctness of title and the right of unity of possession are well displayed in one case, *Rush v. B. C. R. and N. R. Co.*, 57 Iowa, 201. In that case land was held by tenants in common; a railroad company entered upon the land under a deed from one tenant given in pursuance of a contract, and failed to perform its duty under such contract. It was held that the company was liable to two actions, one by the grantor for the breach of contract, the other by the non-assenting tenant for the trespass.

Liability of Interest of Tenant in Common to Execution.

The interest of a tenant in common is liable to execution, *Baker v. Sheperd*, 37 Ga. 12; and though, properly, the levy should be upon the whole of the undivided interest of the defendant, even if greater than the debt, *Galusha v. Sinclair*, 3 Verm. 394, yet, if, by mistake, a levy be made upon a less proportion than that to which the defendant is entitled, the levy will be good for the proportion levied upon, *Brown v. Clifford*, 38 Me. 210; and it has been held that where a levy is made upon a proportion greater than that owned by the defendant, it will be good for the proportion to which he is entitled; see *Atkins v. Bean*, 14 Mass. 404, in which case a levy was made for one undivided seventh, when the debtor was entitled to nine undivided sixty-fourths.

A levy cannot be made by metes and bounds so as to prejudice the cotenant of the debtor, *Bartlet v. Harlow*, 12 Mass. 348; *Brown v. Bailey*, 1 Metc. 254; *Baldwin v. Whiting*, 13 Mass. 57; *Smith v. Knight*, 20 N. H. 9. In Ohio, however, such a levy will so far prejudice the cotenant as to be good for the undivided interest of the debtor in the land so levied upon, *Treon's Lessee v. Emerick*, 6 Ohio, 391.

A levy cannot be made, so as to bind the cotenant, upon any certain part of the land, even if styled undivided, when there is anything to show that any especial part of the land, great or small, was or was not included in the levy, for that would be to allow the creditor to do what the tenant himself could not do, viz., appropriate a particular portion of the land; thus, in *Jewett v. Whitney*, 43 Me. 242, it was held that a levy upon the undivided half, "exclusive of the grist-mill now standing on said premises," was void, MAY, J., saying: "Such a proceeding would be unauthorized. In effect it would be to cut up a fee simple into parts at the pleasure of the creditor. This cannot be done, unless in some cases where the statute authorizes an execution to be levied on the rents and profits of the estate. The present is not such a case. A levy therefore reserving such occupation of a part of the premises set out would be void in relation to the particular part from which the reservation was made." And it is also held that a levy upon the undivided interest of a debtor in a parcel, only, of the estate is invalid, *Blossom v. Brightman*, 21 Pick. 283, in which case the court said: "To allow and give legal effect to such alienation of the interest of a tenant in common in a part of the tenement thus held, either by deed or levy of execution, without the consent of the other cotenant, would be to create new tenancies in common in tracts and parcels of the estate held in common to the injury, and is contrary to the rules of law;" and see, also, *Galusha v. Sinclair*, 3 Verm. 394; this invalidity is, however, with reference to and for the benefit of the cotenant of the debtor; for if, on partition being had, the part levied upon should happen to be assigned to the creditor, the debtor will be estopped by the partition, and the title of the creditor will relate to the time of the levy, *Brown v. Bailey*, 1 Metc. 254; and see *Bartlett v. Harlow*, 12 Mass. 348.

A sale of the estate of one tenant in common on an execution against all does not divest the estate of the other cotenants, *Den ex d. Southerland v. Cox*, 3 Dev. L. 394; and it has been said in general that the purchaser of the interest of a cotenant acquires merely an inchoate right to any part subject to partition, *Flynn v. Herye*, 4 Mo. App. 360.

Improvements.

It is said that a tenant in common may improve the common property even against the consent of his cotenants, *Drennen v. Walker*, 21 Ark. 539; but one tenant in common has no right to improve the common property, by building or by making any alterations in it which would fall within the technical definition of improvements, without the consent of his cotenants, and claim reimbursement from them of a proper proportion of his out-

lay, *Crest v. Jack*, 3 Watts, 238; *Farrand v. Gleason*, 56 Verm. 633; *Kidder v. Rixford*, 16 Id. 169; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Mar. 138; *Stevens v. Thompson*, 17 N. H. 103; *Thompson v. Bostick*, 1 McMull. Ch. 75; *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Dellet v. Whitner*, Cheeve's Eq. 213; *Walter v. Greenwood*, 29 Minn. 87; *Sears v. Munson*, 23 Iowa, 380; *Levi v. Karrick*, 13 Id. 344; *Appeal of Kelsey et al.*, 113 Pa. St. 119; the case of *Gwynneth v. Thompson*, 9 Pick. 31, seems at first to be against the law as above stated; in that case the court said: "If a tenant in common has expended money for the general benefit, and it does not bring into question the title to the land, he may recover in assumpsit of his cotenants the sum expended by him beyond his own proportion." The facts of the case did not, however, justify the general statement contained in the opinion, the claim being for repairs.

Accordingly the tenant in common who makes improvements, without the consent of his cotenant, has no lien for the amount expended, *Green v. Putnam*, 1 Barb. 500; *Mumford v. Brown*, 6 Cow. 475; he cannot hold the premises until repaid, *Crest v. Jack*, 3 Watts, 238, or use the amount, by way of set-off, in an action brought against him by the cotenant, *Walter v. Greenwood*, 29 Minn. 87; and a right to claim compensation for the improvement will not be conferred by the fact that the cotenant stands by, without interfering, while the improvement is being made, unless the non-interference is under such circumstances that an inference of fraud on the part of the non-interfering cotenant can be fairly drawn. Thus in *Crest v. Jack* the plaintiff and the defendants were cotenants in common and the plaintiff was on bad terms with Blair, one of the cotenants. Blair, with the assent of all the other cotenants except the plaintiff, began to erect a house on the common property. The plaintiff gave Blair no notice to desist, and afterwards brought ejectment for his share of the common property. The defendants claimed that the plaintiff could not recover without paying his proper proportion of the cost of the improvement. The court was of opinion that such was not the law, and instructed the jury that the plaintiff was entitled to recover. This instruction was affirmed by the Supreme Court, SERGEANT, J., saying: "One joint tenant or tenant in common cannot erect buildings or make improvements in the common property without the consent of the rest and then claim to hold until reimbursed a proportion of the moneys expended, nor can he authorize this to be done by a third person. If he desires to improve without asking the assent of a coproprietor, his course is to have his share set off by partition and to deal with that as he may see proper. This is the rule at law. There are, however, cases in which an owner of land standing by and permitting another to expend his money

in improving it, has, in equity, been deemed a delinquent and been compelled to surrender his right on receiving compensation or else to pay for the improvement. But in these cases there is always some ingredient which would make it a fraud on the owner of the land to insist on his legal right. There is something like encouragement to the others going on; or the one party acts ignorantly and without the means of better information and the other remains silent when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice; but, on the other hand, I know no case where equity has on the mere ground of silence relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet wilfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is wilful, and he acts at his peril."

Although the improvement may have been made by the tenant in common, under the impression that he was the sole owner of the tract, he cannot claim reimbursement from a cotenant who may have suffered the improvement to be made, without objection, in ignorance of his own rights, *Gregg v. Patterson*, 9 W. & S. 197.

Modification in Equity of the Legal Rule as to Improvements— Equitable Partition.

The rule that a tenant in common who improves is not entitled to ratable compensation from his cotenants, is the legal rule, but it is much modified in equity; and it is held where a tenant in common improves in good faith he will be compensated, on partition being had, by what is called an equitable partition—that is, that, where it can be done without injury to the other tenants in common, the improved portion will be assigned to the improving tenant, *Neil v. Shackelford*, 45 Tex. 119; *Robinson v. McDonald's Widow and Heirs*, 11 Id. 385; *Drennen v. Walker*, 21 Ark. 539; *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Mar. 138; *Crafts v. Crafts*, 13 Gray, 361; *Obert v. Obert*, 1 Hals. Ch. 397; *Town v. Needham*, 3 Paige, 545; *St. Felix v. Rankin*, 3 Ed. Ch. 323; *Hall v. Piddock*, 21 N. J. Eq. 311; *Appeal of Kelsey et al.*, 113 Pa. St. 119; *Osborn v. Osborn*, 62 Tex. 495; and it has been held that, in a proper case, where such assignment cannot be made and the improved part is thrown into the mass, as when a sale becomes necessary in partition, equity will even direct pecuniary compensation to be made to the improving tenant, *Neil v. Shackelford*, *supra*; *Farrand v. Gleason*, 56 Verm. 633; *Conklin*

v. *Conklin*, 3 Sand. Ch. 65; *Brookfield v. Williams*, 1 Green, Ch. 341; *Doughaday v. Crowell*, 3 Stockt. 201; *Broyles v. Waddel*, 11 Heisk. 32; *Green v. Putnam*, 1 Barb. 500; *Ford v. Knapp*, 102 N. Y. 135, reversing S. C., 38 N. Y. S. C. 522.

When the improved portion is assigned to the improving tenant it should be assigned at its value without the improvement, *Hall v. Piddock*, 21 N. J. Eq. 311; *Pope v. Whitehead*, 68 N. C. 191.

To establish the good faith which is required to give rise to the right to an equitable partition it must appear that the improvement has been honestly made and for the purpose of improving and benefiting the common property and not for the purpose of encumbering it or hindering the cotenant in the assertion of his rights, *Hall v. Piddock, supra*.

It is to be borne in mind that the rule of compensation on partition is purely equitable, and it will never be enforced where it works injustice to the other tenants in common, *Beam v. Scroggin*, 12 Ill. App. 321; for it is not to be forgotten that the improving tenant is, in the language of the court in *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Mar. 138, "a mere volunteer, and cannot, without the consent of his cotenant, lay the foundation for charging him for improvements."

The misconduct of the improver or the circumstances of his occupation of the premises may bar his right to compensation. Thus where money was raised by several tenants in common for improvements and was misapplied by one of them, who then expended his own money for improvements, it was held that he was not entitled to a ratable compensation for the amount expended, *Conrad et al. v. Starr*, 50 Iowa, 470; and in *Allen v. Hale*, 50 Me. 253, it is held that where one tenant in common has exclusively occupied the property of the common premises, which he has improved without the consent of the other, he will have no right to have the improved part set out to him on partition, although he may be compensated; but where he occupies with consent then he may demand the improved portion, unless, exclusive of the value of the improvement, it exceed his share of the estate.

Keeping up Quality of Land.

When the improvement takes the character of keeping up the quality of land, and not that of the addition thereto of buildings, there is authority for allowing the tenant in common compensation for the improvement. Thus, in *Cooper v. Cooper*, 9 N. J. Eq. 566, the complainant, the defendant and a third person, a sister of both, owned land in common. The land was leased and impoverished. The defendant entered upon and improved the land. A partition having been had in which the defendant was given

the advantage of the permanent improvement, it was held that on an accounting the complainant should receive one-third of the profits of the land from the time of the defendant's entry up to the time of the partition, allowing the defendant a proper compensation for the erection of fences, manure, and such "temporary improvements." It will be observed, however, that, though called improvements, what was done to the land was rather in the nature of repairs; and repairs, as we shall see hereafter, are governed by a different rule; not that it is meant to say that manuring would fall strictly within the definition of a repair, but that the restoration, by such means, of the strength of impoverished soil partakes rather of the character of a repair than of an improvement.

Agreement with Reference to Improvements.

Of course, where there is an agreement or a definite understanding that the improving tenant shall be repaid his outlay, such an agreement is enforceable, *Sears v. Munson*, 23 Iowa, 380; and where an authorization is given to make improvements, if the tenant honestly and prudently make the improvements contemplated, he will be entitled to compensation therefor, although the event show that he has not done the best, in the way of improvements, that might have been done, *Reed v. Jones*, 8 Wisc. 421.

Right of Grantee of Tenant in Common with Reference to Improvements.

Whatever rights a tenant in common has with reference to improvements made by him will pass to his grantee, *Green v. Putnam*, 1 Barb. 500; but, as the right to compensation is entirely equitable, it seems that the assignee of the improving tenant's share will not be allowed to set up a claim for improvements where the tenant made the improvements without intending to make any claim therefor; thus, in *Beam v. Scroggin*, 12 Ill. App. 321, a husband and wife were cotenants; the husband made improvements; his creditors made a levy upon and purchased his share of the estate; on proceedings in partition it was held that if the husband had made the improvements with the intention *bona fide* of benefiting his wife, and without any expectation of recompense, the creditors could not set up a claim to have the ratable value of such improvements allowed to them.

Tenant in Common has no Right to Compensation for Services to the Common Property, but may obtain such Right by Contract.

A tenant in common is not entitled to pay for his services in managing and taking care of the common property in the absence of a promise, either express or implied, on the part of his cotenants that he shall be compensated for such services; no promise is implied from the mere existence of the tenancy in common, *Powell v. Jones*, 72 Ala. 392; but this rule does deprive him of a right to compensation for services not arising out of the relation of cotenancy; *Id.*; and the relation will not prevent one tenant in common from making a valid agreement with his fellows to render services to the land as agent, *Thompson v. Salmon*, 18 Cal. 632; *Goodenow v. Ewer*, 16 Id. 461.

Repairs.

A tenant in common is bound to contribute his due proportion of the expenses necessarily incurred for repairs by his cotenant, *Anderson v. Greble*, 1 Ashm. 136; *Haven v. Mehlgarten*, 19 Ill. 91; *Farrand v. Gleason*, 56 Verm. 633; *Alexander v. Ellison*, 79 Ky. 148; *Fowler v. Fowler*, 50 Conn. 256; *Loring v. Bacon*, 4 Mass. 176. This position, as applicable to New Hampshire, was doubted in *Stevens v. Thompson*, 17 N. H. 103, by PARKER, C. J., who called attention to the fact that the New Hampshire statute, with reference to repairs by tenants in common, referred only to mills, mill-dams, and flumes—and apparently regarded the writ *de reparatione facienda* as based on a local custom; however, the facts of the case did not call for the decision of the question whether the duty of contributing for repairs existed at common law, and the court did not decide that question, but, assuming the duty to exist under proper circumstances, held that under the circumstances of the case no such duty had arisen.

If the repairs have been made without the assent of the cotenant, then, in order to render him liable for contribution, they must be such as are absolutely necessary, *Dech's Appeal*, 57 Pa. St. 467; *Kidder v. Rixford*, 16 Verm. 169; necessary repairs are defined in *Farrand v. Gleason*, 56 Verm. 633, to be such as are required for the preservation of the common property; the tenant in common, therefore, cannot call on his fellow to contribute to repairs, such as papering, which are merely to gratify taste and for convenience, *Israel v. Israel*, 30 Md. 120; and the term "repairs" has been held not to embrace fences erected on arable land, *Alexander v. Ellison*, 79 Ky. 148; or the improvement of arable land, *Beaty v. Bord-*

well, 91 Pa. St. 438; and it has been even held, that enforcement of contribution for the erection of a new fence, in place of an old one which had become rotten and fallen, will be refused, unless, previous to the erection, the repairing tenant had requested the cotenant to join in such erection and his request had been refused, *Mumford v. Brown*, 6 Cow. 475.

The liability of the cotenant to contribute for repairs was formerly enforced by the writ *de reparatione facienda*, concerning which Fitzherbert, Nat. Brev. 127, A., says: "The writ *de reparatione facienda* lieth in divers cases; one is where there are three tenants in common, or joint or *pro indiviso* of a mill or house, etc., which falls to decay, and one will repair, but the other will not repair the same, he shall have this writ against them." And Coke says: "If two tenants in common, or joint tenants, be of a barn or mill, and it fall into decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith *ad reparationem et sustentationem ejusdem domi teneantur*; whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of man," Co. Litt. 200 b.

This writ has been recognized in this country; see *Anderson v. Greble*; *Alexander v. Ellison, supra*; it alleges, *inter alia*, a refusal on the part of the defendant to repair, and, accordingly, it has been held in jurisdictions in which an action for contribution has taken the place of the writ *de reparatione*, that there must, nevertheless, prior to the bringing of such action, have been a request or notice to join in the repair, together with an opportunity to comply with the requirements of such notice, or circumstances which excuse notice, *Mumford v. Brown*, 6 Cow. 475; *Stevens v. Thompson*, 17 N. H. 103; *Taylor v. Baldwin*, 10 Barb. 582; *McDearman v. McClure*, 31 Ark. 559. The right to contribution may be enforced by an action at law, and it is not necessary for the tenant to go into equity for the purpose of recovery, *Haven v. Mehlgarten*, 19 Ill. 91; *Dech's Appeal*, 57 Pa. St. 467, *Fowler v. Fowler*, 50 Conn. 256, the modern practice of allowing at law the production of books, set off and, in case of necessity, a bill of discovery destroying the necessity of a resort to equity, *Haven v. Mehlgarten, supra*; but if the tenant prefer he may file a bill in equity, or be allowed his compensation on partition, *McDearman v. McClure*, 31 Ark. 559.

The repairs for which contribution may be enforced must, of course, be *bona fide* repairs, and the tenant in common cannot be allowed to experiment with the common property without the cotenant's assent and then call upon his cotenant to assist in bearing the expense occasioned thereby; see *Kidder v. Rixford*, 16 Verm. 169.

Statutory Regulations with Reference to Repairs.

With regard to the repairs of certain kinds of property there are in some States statutory regulations; thus, in Massachusetts, the majority of the tenants in common of a mill, after having held a meeting, of which due notice has been given to all the owners, may proceed to repair or rebuild, whereupon the other owners will be liable for their proportion of the expense and their shares of the common property will be subject to a lien for the amount thereof, Pub. St. (1882), Ch. 190, §§ 59-64, p. 1094; to the same effect is the law in Michigan, Howell's Annot. Stat., Tit. XI. Ch. 37, §§ 1604-1610; Oregon, *Miscell. Laws*, Ch. 37, §§ 15-21. In New Hampshire the statute provides that tenants in common, or part tenants of a mill, milldam, or flume shall repair in proportion to their interests, and that one such tenant may, after due proceedings, obtain an order to repair or to rebuild from the selectmen of the town; but no such order is to be granted without the concurrence of the owner or owners of one-half of the premises; for the amount expended the repairing tenant is given a lien upon the shares of his cotenants, Gen. Laws (1878), Tit. 17, Ch. 141, §§ 1-10, pp. 339, 340. This statute is held to apply only where the cotenants are tenants in common in the use as well as of the mill, dam, or flume itself, *Roberts v. Peavey*, 27 N. H. 477; see this case and *Stevens v. Thompson*, 17 N. H. 103, for explanation of the statute.

Contribution between Tenants in Common on account of Incumbrances, etc.

Where one tenant in common pays money on account of an incumbrance which binds the common property, he is entitled to a ratable contribution therefor from his cotenants, *Titsworth v. Stout*, 49 Ill. 78; *Brown v. Homan*, 1 Neb. 448; *Carter v. Penn*, 99 Ill. 390; *Dickinson v. Williams*, 11 Cush. 258; *Newbold v. Smart*, 67 Ala. 326; *Duke v. Reed*, 64 Tex. 705, and will be entitled to an equitable lien on the shares of his cotenants until they respectively pay their proportions of the debt, *Titsworth v. Stout*; *Newbold v. Smart*, *supra*; *Oliver v. Montgomery*, 42 Iowa, 36; *Watkins v. Eaton*, 30 Me. 529; *Calkins v. Steinbach*, 66 Cal. 117.

The right to contribution arises out of the relationship of the tenants in common as such and not by way of subrogation, *Griffith v. Robinson*, 14 Ill. App. 377; it has been applied to cases where the sum paid was to save the property from sale for the debts of a decedent who had owned the whole, *Griffith v. Robinson*, *supra*; to discharge a municipal assessment, *Dickinson v. Williams*, 11 Cush. 258; for taxes, *Anderson v.*

Greble, 1 Ashm. 136; *Oliver v. Montgomery*, 42 Iowa, 36; *Morgan v. Herrick*, 21 Ill. 481; *Weare v. Van Meter*, 42 Iowa, 128; *Watkins v. Eaton*, 30 Me. 529; for the redemption of property after a tax sale, *Williams v. Gray*, 3 Me. 207; and the right has been extended to cases in which an outstanding title or estate has been bought in by a tenant in common, and his cotenant has availed himself of the purchase; thus, in *Wilton v. Tazwell*, 86 Ill. 29, a tenant in common bought in a dower interest and claimed contribution, it was argued that a distinction should be made between incumbrances which might destroy the tenant's title and those which could not have that effect; that an estate in dower or for life or for years, must by its very nature terminate, and, therefore, could not affect the title to the fee, and that, therefore, as to money paid for any such estate, contribution could not be enforced; the court held that while a different conclusion might have been reached had the non-buying tenant refused the benefit of the extinction of dower, yet, as she had taken advantage of it, she would have to contribute.

While all disbursements for the recovery, defence, and protection of the joint property are matters for contribution, the law expenses of adversary suits between the tenants in common, themselves, are not, *Lewis & Nelson's Appeal*, 67 Pa. St. 153.

The lien for contribution will not be upheld as against a purchaser of the incumbered interest without notice, *Stover v. Cory*, 53 Iowa, 708.

A lien is given by statute to the cotenant paying taxes on the whole tract held in common in Ohio, Rev. St. (1884), Tit. xiii. Ch. 6, § 2854, p. 564; Massachusetts, Pub. Stat. (1882), Ch. 12, § 63, p. 125, and there may be a question where a statutory lien is involved, whether the rule stated above as applying in the case of the equitable lien given by the common law will obtain. The lien is also recognized in Kansas, *Muthersbaugh v. Burke*, 33 Kan. 260. In the District of Columbia the claim of a tenant in common, who pays the taxes on the whole tract, for reimbursement is a mere personal claim, and like other such claims is subject to the Statute of Limitations, *Sturgis v. Holliday*, 4 McAr. 385.

Rule that Purchase of Outstanding Title by one Cotenant enures to the common Benefit.

An important result of the intimate relations existing between tenants in common, is that one will not be permitted to purchase and set up against his cotenants an outstanding title, and from this it follows that, generally speaking, if one tenant in common take from a third person a conveyance of any title to an estate in the property held in common, such conveyance

will enure to the benefit of all the tenants, *Van Horne v. Fonda*, 5 Johns. Ch. 409; *Ligget v. Bechtol*, cited 1 P. & W. 440; *Weaver v. Wible*, 25 Pa. St. 270; *Keller v. Auble*, 58 Id. 410; *Lloyd v. Lynch*, 28 Id. 419; *Knolls v. Barnhart*, 71 N. Y. 474; *Jones v. Stanton*, 11 Mo. 433; *Buchanan v. King's Heirs*, 22 Gratt. 414; *Titsworth v. Stout*, 49 Ill. 78; *Montague v. Selb*, 106 Id. 49; *Bracken v. Cooper*, 80 Id. 221; *Rothwell v. Deweese*, 2 Black, 619; *Lee v. Fox*, 6 Dana, 171; *King v. Rowan*, 10 Heisk. 675; *Tisdale v. Tisdale*, 2 Sneed, 596; *Brown v. Homan*, 1 Neb. 448; *Mandeville v. Solomon*, 39 Cal. 125; *House v. Fuller*, 13 Vt. 165; *Shell v. Walker*, 54 Iowa, 386; *Dillinger v. Kelley*, 84 Mo. 561; and the rule applies irrespective of the validity or invalidity of the title by which the tenants in common hold, thus, in *Davis v. Givens*, 71 Mo. 94, a deed was made to V. and G. of land which was held by one H.; V. and G. brought an action of ejectment against H., which resulted in a compromise, G. paid all the money and took H.'s title, it was held that he could not exclude G., and that the purchase of H.'s title would enure to the benefit of both G. and V.; but in *Roberts v. Thorn*, 25 Tex. 728, the court allowed the fact that the joint title was not alleged to be of any value to weigh with it in deciding that the outstanding or newly acquired title could be held exclusively by the acquirer. In that case one Sterne sold to Thorn, the defendant's intestate, an undivided half of a certain tract, and to another person, the grantee of the plaintiff's decedent, two-thirds of the remaining half; the title became questionable and Thorn obtained the issue to himself of a patent for the whole tract; the plaintiff claimed that the patent should enure to the benefit of both cotenants under Sterne's grant, and offered to pay a ratable share of the expense of obtaining the patent; but the court decided that Thorn's patent could be held by him exclusively saying, that it was not alleged that Thorn was in possession of the land, had superior knowledge or means of information with respect to the condition of the title, or made use of the cotenancy to obtain an unfair advantage, and also that it was not alleged that Sterne's title was of any value, to which last consideration the court gave weight, citing *Smiley v. Dixon*, 1 P. & W. 441. An examination of this latter case will show that it hardly supports the position of the court in *Roberts v. Thorn*. In *Smiley v. Dixon*, one Maxwell, without any authority, sold to Smiley one hundred acres of a certain tract, and to B. and J. Carson the remaining one hundred acres of the same tract. The purchasers and Maxwell went upon the ground and marked out a line of division; none of the purchasers went into possession, and no deed was made, and it soon appeared that Maxwell had no title or power to make title. Smiley then moved on the land and acquired title by improvement.

and the Supreme Court held that he could hold such title exclusively for his own benefit. It is manifest that here there was no tenancy in common, for each purchaser bought a certain number of acres, which were set off, and not an undivided interest or share, and upon this ground the court went. HUSTON, J., in delivering the opinion of the court, said, after recognizing the general rule: "In this case, these men did not purchase jointly, neither had anything by purchase from Maxwell; they were not joint tenants nor tenants in common, and there was no priority between them. The bare fact that each had been cheated neither gave any right to the other, nor deprived him of the full and absolute right to purchase from the real owner when discovered. The State was the real owner, and Smiley purchased from the State by his actual settlement." The case of *Roberts v. Thorn*, at least so far as it holds that the validity or invalidity of the common title is an element to be considered in passing upon the effect of the purchase of an outstanding title by a tenant in common, appears to be unsupported by authority, and the doctrine therein maintained is destructive of that confidence which one tenant in common has a right to repose in his fellow, and, if carried to a legitimate conclusion, might refuse protection to the cotenant in precisely the case in which protection was most needed by him.

The rule applies where two tenants are in possession by a possessory title and one buys in the fee, *Boscowitz v. Davis*, 12 Nev. 446; and it will apply between remaindermen in common, where the purchase of the outstanding title is made during the continuance of the particular estate, *Harrison v. Harrison*, 56 Miss. 174.

The rule is subject to modification, and in cases which do not fall within its reason it will not be applied. The reason of the rule was well stated by KENT, Ch., in *Van Horne v. Fonda*, 5 Johns. Ch. 388 (which is the leading case on the subject) as follows: "I will not say, however, that one tenant in common may not in any case purchase an outstanding title for his exclusive benefit. But when two devisees are in possession under an imperfect title devised from their common ancestor there would seem naturally and equitably to arise an obligation between them, resulting from their joint claim and community of interest, that one should not assert the claim to the prejudice of the other. It is like an expense laid out upon a common object by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties or claimants of the common subject created, that one of them should be able without the consent of the other to buy in an outstanding title and appropriate a whole subject to himself, and thus undermine and oust his

companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, and the relationship of the parties as joint devisees created. Community of interest produces community of duty, and there is no real difference on the ground of policy and justice whether one cotenant buys up an outstanding incumbrance or an adverse title to disseize and expel his cotenant. It cannot be tolerated when applied to a common subject in which the parties have equal concern, and which created a mutual obligation to deal candidly and benevolently with each other and to cause no harm to their joint cotenant."

Bearing in mind the reason of the rule, we may review some of the applications of it. It has been in some cases maintained that the rule applies only where the interests of the tenants accrue under the same instrument, or the same act of the parties or where some engagement or understanding exists between the tenants in common; see *Frenz v. Klotzsch*, 28 Wisc. 312, and the remarks of WHEELER, J., in *Roberts v. Thorn*, 25 Tex. 728, and see also, *Rippetoe v. Dwyer*, 49 Id., 498, where, however, the remarks of the court upon this subject are mere dicta, and the same remark will apply to the case of *Brittin v. Handy*, 20 Ark. 381, for though the rule is stated to be limited in its application as above, yet an examination of the case will show that it was really the case of buying the cotenant's share on an execution against him, and not the case of purchasing an outstanding title to the whole land; but see *contra, Rothwell v. Dewees*, 2 Black, 619, and in *Bracken v. Cooper*, 80 Ill. 221, where the question was carefully considered by the Supreme Court of Illinois, the court, speaking by SHELDON, J., said, "We do not find sufficient authority or reason to induce us to adopt the qualification of the doctrine as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the incidental circumstances whether the relationship of the parties be constituted by the same instrument or act of the parties or of the law or not." And see *Montague v. Selb*, 106 Ill. 49, where the same doctrine was held. A consideration of this subject will, we think, convince the mind that to restrain the duty of, what we may call, inter-allegiance of the tenants in common, to cases in which their possession originates under the same deed, or by the same act, would be to introduce distrust amongst persons who from the nature of things, ought to be living and acting in reliance upon each other; and no possible injustice or harm can be worked by

the extension generally given to the rule prohibiting the procurement and setting up an adverse title, for if any tenant so desire, he can compel partition of the common property, and then he is at liberty to purchase any title he pleases and make such use thereof as may best suit him.

The rule has been made in some cases to depend upon possession or the right of possession, and it has been held, that where neither tenant was in possession, either could purchase an outstanding title for himself, see *Alexander v. Sully*, 50 Iowa, 192; in which case SEEVERS, J., said: "The true rule seems to be . . . that where the tenants or owners are in possession under an imperfect title, one cannot purchase an outstanding title and appropriate the whole to himself, and thus oust the other; see also *Venable v. Beauchamp*, 3 Dana, 321; but this principle does not extend to a tenant in common after eviction, *Coleman v. Coleman*, 3 Id. 398." And in a case where two were tenants in common by occupancy of land of which the fee was in the United States, and one died, and, after his death, his cotenant conveyed his half interest to another person, who, with the co-operation of his grantor, obtained a title from the government, it was held that while the heirs of the deceased cotenant were entitled to regard the surviving tenant as their agent in perfecting title as to one-half, yet the grantee of the survivor could hold his half without being liable to any account. *Gillett v. Gaffney*, 3 Col. 351.

The rule will prevent the purchase of the property for the exclusive benefit of the tenant in common at a sale under foreclosure proceedings on a mortgage, *Edmund's Appeal*, 68 Pa. St. 24; *Smith v. Osborne*, 86 Ill. 606; and in *Knolls v. Barnhart*, 71 N. Y. 474, it was held that where a widow, who, as dowress and guardian in socage of minor children, was tenant in common with heirs of the decedent, bought in a mortgage which bound the common property, foreclosed it, and purchased the property, she did not take a good title as against her cotenants. In the same way, where the common property is sold on an execution against the other tenants, one tenant in common cannot buy in the land for his exclusive use, but his purchase will enure to the benefit of all, *Gibson v. Winslow*, 46 Pa. St. 380; but there is nothing in the rule which will prevent one tenant in common from purchasing the shares of his cotenants in common when sold on execution, *Catlin v. Kidder*, 7 Vt. 12; *Brittin v. Handy*, 20 Ark. 381; *Gunter v. Laffan*, 7 Cal. 588; or the executor of one tenant in common purchasing the share of another for his own private benefit, *Alexander v. Kennedy*, 3 Grant, 379.

The rule applies to tax sales, and a tenant in common will not be permitted to buy at a tax sale and exclude his cotenant, *Davis v. King*, 87 Pa. St. 261; *Sears v. Sellew*, 28 Iowa, 501; *Dubois v. Campau*, 24 Mich.

360; *Weare v. Van Meter*, 42 Iowa, 128; *Shell v. Walker*, 54 Id. 386; *Smith v. Smith*, 78 Iowa, 608; *Brown v. Hogle*, 30 Ill. 119; *Piatt v. St. Clair's Heirs*, 6 Ohio, 227; *Douglas v. Dangerfield*, 10 Id. 152; *Chickering v. Faile*, 38 Ill. 342; *Burhaus v. Van Zandt*, 7 N. Y. 523; *Moore v. Titman*, 44 Ill. 367; *Allen v. Poole*, 54 Miss. 323; *Downer's Adm'r v. Smith*, 38 Verm. 464; *Lacey v. Davis*, 4 Mich. 140; *Page v. Webster*, 8 Id. 263; *McConnel v. Konepel*, 46 Ill. 519; *Conn v. Conn*, 58 Iowa, 747; *Moore v. Woodall*, 40 Ark. 42; *Muthersbaugh v. Burke*, 33 Kan. 260; and the rule is held not to be confined in its application to cases in which the purchaser was the tenant in possession, for "the duty springs from the ownership," *Butler v. Porter*, 13 Mich. 292; and if, after a tax sale one tenant in common redeem the land, within the period of redemption, he cannot hold the land exclusively, and this is held although his acquisition of title, if within the period of redemption, be in form not a redemption, but a purchase from the buyer at the tax sale, *Maul v. Rider*, 51 Pa. St. 377; *Battin v. Woods*, 27 W. Va. 58; *Minter v. Durham*, 13 Ore. 470; and see *Dubois v. Campau*, 24 Mich. 360, in which case, so far as appears by the report, the court may have gone even further and held that where a tenant in common in possession neglected to pay taxes, and the land was sold therefor to a *bona fide* purchaser, who afterwards sold to the tenant in common, the latter purchase would merely work a redemption and reinstate the old common title. The tax sale in *Dubois v. Campau* was in 1856, a deed was made to the purchaser in 1857, but the date of his deed to the tenant in common is not given. The rule applies where one has become assignee of the certificate of purchase before taking the title to the other cotenant's interest, and afterwards takes the tax title, *Flinn v. McKinley*, 44 Iowa, 68; *Tice v. Derby*, 59 Id. 312; and to the grantees of a tenant in common who has been obliged to pay the tax for the year for which the land was sold, although he was not personally liable for such tax, *Austin v. Barrett*, 44 Iowa, 488.

As the rule in its particular application to tax sales might sometimes work a hardship, it has been provided by statute in several States that a tenant in common may redeem his *share* alone after a tax sale by paying a proportionate share of the tax and expenses due, Michigan, Howell's Annot. Stat. (1882), Tit. 26, Ch. 232, § 6123, p. 1588; South Carolina, Gen. Stat. (1882), Pt. 1, Tit. 3, Ch. 11, § 303, p. 109; Arkansas, R. S. (1874), Ch. 116, § 5204, p. 924; Acts 1883, § 142, p. 270 (March 31, 1883).

How long Inability to acquire Title adversely lasts.

The prohibition of acquiring and setting up an adverse title lasts only during the continuance of the tenancy in common, and, when that relation has ceased, the fact that it has formerly existed will not invalidate any purchase by one who was formerly a tenant in common, or cause such purchase to enure to the benefit of any one who formerly sustained such relation toward him. Thus, when the land has been sold for taxes, and, after the expiration of the time allowed by law for redemption, one who was tenant in common of the land at the time of the sale buys from the purchaser, he may hold for himself, *Reinboth v. Zerbe Run Improvement Co.*, 29 Pa. St. 139; *Watkins v. Eaton*, 30 Me. 529; *Kirkpatrick v. Mathiot*, 4 W. & S. 254; *Lewis v. Robinson*, 10 Watts, 354; so where the land purchased has been actually lost in an action and there has been an eviction of the tenants in common, *Coleman v. Coleman*, 3 Dana, 398; but where there has been a fraudulent arrangement between a cotenant and the adverse recoveror, there a purchase by the former of the land recovered will still enure to the benefit of all the tenants in common, as in *Oliver v. Hedderly*, 32 Minn. 455, where one tenant in common of premises subject to a mortgage, made an agreement with the mortgagee, whereby the latter was to foreclose the mortgage and, after the expiration of the time of redemption, to convey the land to the other party to the agreement. The arrangement was carried out. It was held that, as at the time of the agreement the relation of tenancy in common existed, the case came within the general rule. The rule does not prevail where the positions of the cotenants have become antagonistic, *Wells v. Chapman*, 4 Sandf. Ch. 312, 13 Barb. 561; as where titles are fought over between the cotenants, *King v. Rowan*, 10 Heisk. 675; and it is held that a tenant in common is not estopped from buying in a distinct title to protect a title which he maintains, adversely to his cotenant, under the Statute of Limitations, *Larman v. Huey's Heirs*, 13 B. Mon. 436.

After a partition with warranty, whether express or implied, where an adverse title is brought in the rule will still apply, on account of the warranty. Thus in *Venable v. Beauchamp*, 3 Dana, 321, A. and B. were tenants in common. B. sold his share to C. by an executory contract; A. and C. then agreed on a partition, and A. and B. made the deeds in partition. B. then made a conveyance to C.; it was held that C. was bound by the rule of loyalty to the common title; and see *Williams v. Gray*, 3 Me. 207.

Waiver of Right to share in Purchase.

The rule being for the benefit of the cotenant it may be waived by him, and if he so act as to destroy the presumption that the purchase of the outstanding title was for the common advantage, the purchasing tenant may set up the title acquired by him adversely. This will be the effect where the non-purchasing cotenant refuses to contribute to the expense of purchasing the outstanding title, and it is held that the cotenant must manifest his election to contribute within a reasonable time, *Brittin v. Handy*, 20 Ark. 381; *Lee v. Fox*, 6 Dana, 171; *Weaver v. Wible*, 25 Pa. St. 270; *Lloyd v. Lynch*, 28 Id. 419; for as said in *Mandeville v. Solomon*, 39 Cal. 125, equity exacts "the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition and having upon its own principles of fair dealing compelled the purchasing tenant to allow his cotenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him or to make it a means of speculation for himself by delaying until the rise of the land or some event yet in the future shall determine his course. Unless he make his election to participate within a reasonable time and contribute or offer to contribute in ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits."

Before the non-purchasing tenant can be deprived of his right to share in the purchase, on the ground that he has not contributed, it must appear that he has had the opportunity of contributing and the burden rests upon the purchaser to show that his cotenant had notice both of the purchase and of the claim set up by the purchaser to hold the same, since otherwise the cotenant will have a right to presume that the purchase was for the joint benefit and is to be settled for in the usual way, *Buchanan v. King's Heirs*, 22 Gratt. 414, and there may be circumstances which will dispense with tender of contribution within a reasonable time, see *Flagg v. Mann*, 2 Sumn. 487; *Boskowitz v. Davis*, 12 Nev. 446.

Lease of Share—Agreement between Tenants in Common as to Use and Occupation of the Land.

One tenant in common may lease his share to another, or there may be such an express agreement as to the use and occupation of the land as will support an action therefor, *Davies v. Skinner*, 58 Wisc. 638; *Curtis v. Swearengen*, Breese, 207; or trespass, as in the case of a stranger, *O'Hear v. DeGoesbriand*, 33 Verm. 593; or a distress, *Luther v. Arnold*, 8 Rich. 24; and such agreement may well take the shape of an arrangement as to the time of separate occupation by each tenant in common, as

that the tenants shall occupy each for two weeks, turn and turn about, *Curtis v. Swearengen, supra*; but to sustain an action of assumpsit for rent, or for use and occupation, there must be an express promise; thus where an agreement was made by the wife of a tenant in common to pay rent to the cotenant, it was held that before the husband could be held liable it must be proved that he knew of his wife's contract and thereafter continued his occupancy of the land without objection or notice to his cotenant, *Wilbur v. Wilbur*, 13 Metc. 404; and where, after the expiration of a lease or agreement between tenants in common, the lessee holds over, his possession will be referred rather to his rights as tenant in common than to a tortious holding over, and hence he cannot be held liable to penalties prescribed in the case of holding over by a tenant, *Mumford v. Brown*, 1 Wend. 52; *Rockwell v. Luck*, 32 Wisc. 70; (*Curtis v. Swearengen* is *contra*); but the tenant in common so holding over may by his acts recognize the lease, *Rockwell v. Luck, supra*; *Dresser v. Dresser*, 40 Barb. 300; *McKay v. Mumford*, 10 Wend. 351.

No Implied Promise to pay Rent at Common Law.

While rent might become due and recoverable by contract, yet, at common law, where one tenant in common took possession of and used the premises, or rented them out and received rent therefor, the only remedy of another cotenant against him (unless he had actually ousted the other cotenant, or had been expressly constituted his bailiff, Co. Litt. 200 b.; *McAdam v. Ore*, 4 W. & S. 550) in the absence of an express promise to pay, was partition, for between tenants in common there is no implication of any promise to pay for use and occupation, although the occupation be permissive, and hence no action of assumpsit for rent, *Sargent v. Parsons*, 12 Mass. 153; *Kline v. Jacobs*, 68 Pa. St. 57 (which case is regarded in *Norris v. Gould*, 15 W. N. C. 187, as overruling *Boreel v. Boreel*, 33 Pa. St. 492, in which a recovery between tenants in common had been allowed on an implied assumpsit*) *Gowen v. Shaw*, 40 Me. 56; *Woolever v. Knapp*, 18 Barb. 265; *Izaid v. Bodine*, 3 Stock, 403; *Pico v. Columbet*, 12 Cal. 414 (but this rule is held not applicable to the case of a mine or ditch, and hence a tenant in common of a ditch can maintain an action for the sale of water therefrom, *Abel v. Love*, 17 Cal. 233); or for the proportion of rents received, *Sherman v. Ballou*, 8 Cow.

* Since the above was written the case of *Luck v. Luck* has been reported, 113 Pa. St. 256 (1887), in which the Supreme Court was evenly divided as to whether an action could be brought upon an implied assumpsit for the value of crops raised and appropriated by a tenant in common.

304; and at common law no one tenant in common could maintain an action of account against another for receiving more than his just share of the proceeds of the common property, either in rent or use, *Kline v. Jacobs, supra.*

Statute of 4 Anne, c. 16, and American Statutes of similar Character.

To remedy, at least in a measure, this practical injustice, resulting from the theory which controlled the relations of tenants in common, was passed the Statute of 4 Anne, c. 16, which provides that where one tenant in common or more shall receive more than his or their proportion of the profits of the common estate, the other tenants in common, their executors or administrators, may have an account against him or them as bailiffs. This Act is in force in several of the United States, Pennsylvania, Report of the Judges, 3 Binn. Appendix, 625; Alabama, *Pope v. Harkins*, 16 Ala. 321; Virginia, see Act of 1748; Kentucky, *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Mar. 138; *Coleman v. Hutchenson*, 3 Bibb, 209; Massachusetts, *Brigham v. Eveleth*, 9 Mass. 538; *Munroe v. Luke*, 1 Met. 459; and in other States Acts the same or similar in terms have been passed: Rhode Island, Pub.¹ Stat. (1882), Ch. 231, § 2; New Jersey, Rev. Stats. (1877), p. 4, pl. 3; Connecticut, Act 1729, Gen. St. Rev. (1875), Ch. 17, pt. 1, '§ 4, p. 467; Maine, Rev. St., Ch. 95, § 20, p. 791; Indiana, Rev. St. (1881), § 288, p. 50; Kansas, Comp. L., Ch. 55, § 22 (3014), p. 521; Michigan, Howell's Annot. Stat. (1882), Tit. xxii., Ch. 218, § 5778, p. 1502; Minnesota, Gen. Laws (1878), Ch. 75, § 43, p. 820; Wisconsin, Rev. St. (1878), Ch. 99, § 2199, p. 631; Oregon, Gen. Laws (1872), Misc. L., Ch. 17, § 38, p. 589; Illinois, Rev. St. (Hurd, 1883), Ch. 2, § 1, p. 96; Vermont, Rev. Laws (1880), Ch. 67, § 1202, p. 277; New Hampshire, Gen. Laws (1878), Tit. 26, Ch. 220, § 3, p. 508; Virginia Code (1873), Tit. 43, Ch. 142, p. 992.

Rule that Tenant in Common is accountable under the Statute only for Rents and Profits actually received.

Under the Statute of Anne and the kindred Acts, it is generally held that the defendant is accountable, only for what he receives in rent, either in money or in kind, and for profits actually received in money; and that an action will not lie under the statute for taking and retaining sole possession of the land and applying its products to the use of the holder, so long as he do not oust his cotenant or prevent his having a joint occupation if he so desire—the rule is sometimes expressed that the defendant is

to account for what he receives, not for what he takes, *Cutler v. Currier*, 54 Me. 81; *Crane v. Waggoner*, 27 Ind. 52; *Webster v. Calef*, 47 N. H. 289; *Chambers v. Chambers*, 3 Hawks, 232; *Norris v. Gould*, 15 W. N. C. 187; *Woolever v. Knapp*, 18 Barb. 265; *Joslyn v. Joslyn*, 16 N. Y. S. C. 388; *Reynolds v. Wilmeth*, 45 Iowa, 698; *Izard v. Bodine*, 11 N. J. Eq. 403; *Buckalew v. Snedeker*, 27 Id. 82; *Barrell v. Barrell*, 25 Id. 173; *Sargent v. Parsons*, 12 Mass. 152; *Doane v. Badger*, Id. 149; *Badger v. Holmes*, 6 Gray, 118; *Den d. Meredith v. Andres*, 7 Ired. L. 5; *Colburn v. Mason*, 25 Me. 434; *Roseboom v. Roseboom*, 22 N. Y. S. C. 309; *Dresser v. Dresser*, 40 Barb. 300; *Wilcox v. Wilcox*, 48 Id. 327; *Newbold v. Smart*, 67 Ala. 326; *Hutton v. Powers*, 38 Mo. 353; *Everts v. Beach*, 31 Mich. 136; *Campbell v. Campbell*, 21 Id. 438; *Bird v. Bird*, 15 Fla. 424; *Austin v. Ahearne*, 61 N. Y. 6; *Richardson v. Richardson*, 72 Me. 403; *Kean v. Connelly*, 25 Minn. 222; *Israel v. Israel*, 30 Md. 120; *Elwell v. Burnside*, 44 Barb. 447; *Ragan v. McCoy*, 29 Mo. 356; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Peck v. Carpenter*, 7 Gray, 283; *Varnum v. Leek*, 65 Iowa, 751; *Sailer v. Sailer*, 41 N. J. Eq. 398; and the rule goes so far that it is held that where on partition a tenant who has occupied and improved the common premises seeks an equitable partition he will not be compelled to pay, or offer to pay, for the use and occupation of the land as a condition of making a partition of the character prayed for, *Wilkinson v. Stuart*, 74 Ala. 198.

An attempt has sometimes been made to carry the responsibility of the defendant tenant beyond the limit of actual receipts, and to hold him responsible for what he ought to have received or might have made of the land but for his wilful default, on the ground that the act made the tenant in common liable as bailiff; and it has been argued that this assimilated the liability of the occupying tenant in common to that of a bailiff at common law; but when this question was considered by the Common Pleas in the case of *Wheeler v. Horne*, Willes, 208, WILLES, C. J., in delivering the opinion of the court, said: "The words of that Act are, that from and after, etc., actions of account may be brought by one joint tenant or tenant in common against the other as bailiff *for receiving more than comes to his just share or proportion*. . . . Though an action of account, therefore, may be brought by one tenant in common against another since this statute, yet it is an action of a very different nature from an action of account against a bailiff at common law. First. Because a bailiff at common law is answerable, not only for his actual receipts, but for what he might have made of the lands without his wilful default, as is expressly held in Co. Litt. 172 a, and in many other books; but by the plain words of the statute a tenant in common, when sued as bailiff,

is answerable only for so much as he has actually received more than his just share and proportion ;" and see *Sturton v. Richardson*, 13 M. & W. 17. This statement of the law has been recognized in this country as correct. In *Gowen v. Shaw*, 40 Me. 56, the defendant, a tenant in common, occupied, by another person, three-fourths of the common property ; the plaintiff, the other tenant in common, claimed to recover a sum which would have been a proper rent of the land after deducting therefrom the proper proportion of the defendant ; there was no evidence that the tenant under the tenant in common had paid any rent. The counsel for the plaintiff argued that it was not necessary to prove that the tenant actually received rents or profits from *another*, that it was enough that he occupied the premises by himself or an agent, that such occupation implied a promise to pay a reasonable rent, and that there was a presumption that the defendant received rent from his tenant. But the court, APPLETON, J., delivering the opinion, held to the general rule of law as above stated, saying : "There is no evidence that the defendant has received anything from the tenant occupying the premises. The burthen was on the plaintiff to show that he has in his hands more than his just share or proportion." And the court remarked, also, that in the cases of *Munroe v. Luke*, 1 Metc. (Mass.) 459, and *Buck v. Spofford*, 31 Me. 34, cited by the plaintiff, the defendants had received rents and profits in money.

In *Webster v. Calef*, 47 N. H. 289, there was attempt made to induce the court to go beyond the usual rule, and allow a recovery for an excessive application of products, but the court decided in accordance with the old rule, and held that Rev. St. Ch. 180, § 6, applied only in cases of ouster.

While, as we have seen, an occupying tenant is not liable for the products of the land which he appropriates to himself, still, if he sell the products and make a profit, he may be held to account therefor, if it be distinctly shown that such profit is beyond the mere use of the land and beyond what the tenant's share of profits, properly apportioned, would amount to, *Munroe v. Luke*, 1 Metc. 459 ; *Buck v. Spofford*, 31 Me. 34 ; but the *receipt*, even where the claim is for profits, is a *sine qua non* to an account, as said by COOPER, J., in *Tyner v. Fenner*, 4 Lea, 469 : "It is the actual receipt of such excess which creates the liability."

Liability confined to net Rents and Profits—Allowance to Tenant.

The liability of the tenant in common to account is only for *net* rents and profits, *i. e.*, the amount remaining after allowing the sums for taxes, necessary repairs, etc., which he has paid out of the rents, *Hannan v.*

Osborn, 4 Paige, Ch. 336; *Pickering v. Pickering*, 63 N. H. 468; and, as against profits, expenditures for such usual repairs as a prudent landlord would make on his own property or allow to his tenant as a deduction from the rent, and also expenditures for reasonable permanent improvements, *Tyner v. Fenner*, 4 Lea, 469; and, where profits have been derived from farming, the amount expended for lime and other fertilizers, *Luck v. Luck*, 113 Pa St. 256. In *Pickering v. Pickering, supra*, it was argued that as the cotenant could not recover for repairs without proving a request to his fellow to join in making them, so, therefore, they should not be allowed in an account; but the court held that, granting the first position assumed, it did not follow that in an equitable accounting for income, part of which had been produced by the repairs, the defendant should not be allowed for them, and BINGHAM, J., said: "The objection that no privity, no joint knowledge, no authority existed is in equity and good conscience waived when the entire income is demanded. It is not unlike the ratification of the acts of an assumed agent; it relates back to the time of making the repairs, and makes the plaintiff a party from the beginning." An amount expended for insurance will not, however, be allowed where it does not appear to have been procured in the interest or with the knowledge of the non-occupying tenant, who has not derived any benefit from it, *Pickering v. Pickering*. To justify a recovery for receiving a surplus, it must appear that the defendant received more than his share of *all* the profits of the products of the estate; it is not sufficient if it appear that he received an excessive portion of the profit upon a single product, *Shepard v. Richards*, 2 Gray, 424; but where a rent has been received from a lessee of the entire premises by one cotenant, it is no defence that the lessee in fact occupied but one-half of the common property, so that the non-leasing cotenant could have taken possession of the unoccupied half, for the rent was received for the whole property, *Holmes v. Best*, 58 Vt. 547.

Profits to be accounted for must arise from the Land itself.

The profits to be accounted for must be such as arise from the land itself, and the occupier is not bound to account for the profits of a business which he carries on on the common premises, *Neil v. Shackelford*, 45 Tex. 119. *Newman v. Newman*, 27 Gratt. 714, at first sight seems contrary to this statement. In that case a father died, leaving a forge which his son had operated in the interest of the family in the father's lifetime, and the property descended to the son and a daughter; the son retained possession of the forge and carried on the business with the assent of his sister; it was

held that he must account for the profits of the business, being made a proper allowance for his personal services. A little examination will show that this case does not necessarily conflict with the rule that the profits must be directly from the land to become a subject of recovery, since the action of the son was evidently merely in continuation of the arrangement made during his father's lifetime and a conventional joint interest had arisen in the business of the forge itself.

Exceptions to the Rule above stated.

There are some cases which, however, depart from the general rule above stated as governing accountability, and in some localities a different rule prevails or has prevailed. Thus in South Carolina it has been held that a tenant in common who occupies more than his share of the common property is liable for rent of so much of the premises as was capable of producing rent at the time he took possession, *Thompson v. Bostick*, 1 McMull. Eq. 75; *Hancock v. Day*, Id. 69; *Volentine v. Johnson*, 1 Hill, Ch. 49; and while the decisions which have so held have been in cases in equity, yet the court does not seem to have proceeded upon any distinction between law and equity. All these decisions are based upon *Thompson v. Bostick*, decided in 1830, in which HARPER, Ch., laid down the principle, "To cultivate and have the use of lands is to receive the rents and profits, although the occupier is his own tenant." The plaintiff, however, was held not entitled to recover a share in the enhancement of rent caused by the labor or improvements of the occupier, *Thompson v. Bostick*, *Hancock v. Day*, *supra*; *Holt et ux. v. Robertson*, 1 McMull. Eq. 478; and if the latter only cultivated a part of the land which, in proportion to the whole tract, was not greater than the proportion borne by the undivided interests of the occupier to the entire estate, it was held he could not be compelled to account, *Lyles v. Lyles's Administrator*, 1 Hill, Ch. 76. Such was the state of the law on this subject in South Carolina down to 1880, when the question of an accounting between tenants in common coming before the Supreme Court, in *Jones v. Massey*, 14 So. Car. 292, the following rule was laid down to govern the taking of the account: "Ascertain whether James R. Massey cultivated more of the tillable land than his proportion before election. If not, then there is nothing due by him. If he did, then he should be charged with the rents and profits of the excess; that is to say, if he rented the land he should be charged with the rents received; and if he cultivated them, then, with the profits actually received from such cultivation without regard to the skill which he happened to possess as a farmer or his habits of industry." It

will be seen that this rule departs very widely from the rule formerly held in South Carolina, which subjected the occupier to an occupation rent, and, but for the peculiar force given to the expression "receive rents or profits," might seem to bring the law in South Carolina into practical harmony with the general rule governing accountability elsewhere. A later case, *Corley v. Holloway*, 22 So. Car. 380, merely reiterates the rule that a person occupying no more than his share need not be held liable, but does not enter into the general question.

Some of the later cases in Maine seem to adopt the earlier South Carolina rule, and to apply it to accountability under the Statute of 1848, c. 61, § 1, see *Cutler v. Currier*, 54 Me. 81, in which DICKINSON, J., while admitting the law under the Statute of Anne to be as we have stated it is generally held, goes on to say: "The words 'taking and receiving the rents, profits, or income' have no technical or recondite signification, but are to be understood according to their ordinary acceptation. A farmer 'takes' or 'receives' the products of his farm. He takes them by his own efforts and receives them from the hands of mother earth. He is an actor or a recipient, as he sustains the one or the other of these relations. Receiving is one of the modes of taking. These words are often used synonymously and have substantially the same meaning in the statute, though in strict verbal accuracy the one more appropriately expresses the idea of accepting rents and the other that of gathering crops." And see, also, *Richardson v. Richardson*, 72 Me. 403, where the court regarded the effect of the Maine Statute as extending the effect of the Statute of Anne so as to embrace cases in which the defendant had used and occupied more than his share of the land, or had taken the surplus otherwise than in money. It may be here noted that the Maine Statute is held not to apply to the case of a disseizor or to a case where the tenant in common takes the rents and profits with the consent of his cotenant, *Dyer v. Wilbur*, 48 Me. 287.

The English doctrine requiring an actual receipt to raise an accountability has been abandoned in Virginia, *Early and Wife v. Friend*, 16 Grat. 21; and in *White v. Stuart*, 76 Va. 546, the Court laid down the Virginia rule as follows: "This court, however, in *Early and Wife v. Friend et al.*, 16 Grat. 21, overruled the English doctrine, and held that one tenant in common or joint tenant occupying the premises to the exclusion of his cotenant is accountable for receiving more than his just share, whether paid by a stranger or derived from his use and occupation of the property.

"The court was, however, careful to guard the rule thus laid down by saying that occupying tenant is liable only for the fair value of the property in the condition in which it was at the time it went into his posses-

sion and that the cotenants are not entitled to the benefit of the issues and profits made by the application of the skill and capacity of the occupying tenant bestowed on the common property." In *Graham v. Pierce*, 19 Grat. 28, the same court held that while as a general rule the charge against the occupying tenant should be a fair rent, as in *Early v. Friend*, yet there were circumstances in which it would be proper to take an account of issues, and so held in the case of a lead mine, charging the defendant with receipts and crediting him with the outlay. [It would seem, however, that this would have been a proper case for an account under the general rule as to tenants in common.] And the court has also held that where the outcome of the property has left no surplus or profit, the occupier ought not to be charged for his possession of the land, although he has experimented with or upon it, provided his expenditures have been in good faith and in an honest, although unsuccessful, endeavor to render the property more profitable, *Ruffners v. Lewis's Executor*, 7 Leigh, 720; and a defendant is not to be held for speculative profits where no real ones are ascertainable, *Id.* Where the cotenant enters on unproductive land and improves he cannot be held to pay a rental, for the statute was intended to give a remedy "by which the profits of the estate growing out of its condition when acquired, or which the estate yielded or would yield independently of any extraordinary experiment by the party receiving the profits might be apportioned according to the interests of the cotenant, and the receiver compelled to account to his cotenant for his share," *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Mar. 138; this decision was upon the Virginia Act of 1748.

In Vermont, from the language of the court in *Hayden v. Merrill*, 44 Verm. 336, it would seem that, what the court calls, the narrow construction given by the English courts to the statute, will not be applied to the statute of Vermont, but the case does not necessarily so decide, for the court said that the "occupancy by the defendant was not only entire and exclusive in fact, but that from the peculiar purpose to which he fitted and applied it, it was necessarily and intentionally exclusive of any use or occupancy by the plaintiff." This being the state of facts, the case falls within the recognized exception to the general rule, *i. e.*, where the occupying tenant excludes his cotenant, and the case of *Hayden v. Merrill*, though doubtless foreshadowing what the decision on the ordinary rule of accountability will be when the question properly arises, cannot be regarded as having settled the question in Vermont.

In North Carolina it was at first held that the liability to account arose only from actual receipt of rent or profits, *Wagstaff v. Smith*, 4 Ired. Eq. 1; but this case was overruled in *Northcott v. Casper*, 6 Id. 303, in which

case the court held that the effect of the Statute of Anne (which was afterwards in effect re-enacted by R. C., Ch. 31, § 99) was to introduce between the parties the relation of principal and bailiff as fully as if the same had been done by express agreement and stipulation on the part of one to act for all; and see *Jolly v. Bryan*, 86 N. C. 457; this, of course, enlarged the liability of the occupying tenant, and we accordingly find that "receipt" is used in the broad sense in North Carolina, and the occupying tenant charged whether he has rented out the premises or not, *McPherson v. McPherson*, 11 Ired. 391, but where the occupying tenant has abstained from occupying more than a due proportion of the land, he is not held accountable, see *Roberts v. Roberts*, 2 Jones Eq. 128. In that case one of two brothers, tenants in common, the other having left the State, entered on the common property and built thereon; but the area occupied by him did not equal the amount of land which would have been given to him on a partition being had; he also left room for his brother, in case he should return; it was held that the brother, on his return, could not call for an account of rents and profits.

In Mississippi the law is left in some doubt, so far as appears by decided cases. *Medford v. Frazier*, 58 Miss. 241, was the case of a bill for an account of rents received. CHALMERS, C. J., said: "The occupying tenant will not be liable for rents unless it be shown that he occupied more than his just proportionate share of the common estate, and then only for the rent of the excess." The report leaves it doubtful whether the occupancy were in person or by tenant; the argument of the counsel for the appellants, however, seems to show actual occupancy and tilling by the tenant; but as the case was heard on a demurrer, and the bill alleged a *receipt* of rents, it can hardly be considered as an authority except for the position raised in the pleadings, though from the language it may seem to go farther and to be not inconsistent with what we may call the earlier South Carolina rule.

The language of the Connecticut statute would justify the courts of that State in holding an occupying tenant in common to a stricter rule than that generally enforced under the statute of Anne, but the question does not seem to have arisen in the court of last resort of Connecticut. The statute is as follows: "When two persons hold any estate as joint tenants, tenants in common, or coparceners, if one of them shall receive, use, or take benefit of such estate in greater proportion than the amount of his interest in the principal estate, he and his executors or administrators shall be liable to account to his cotenant; and such cotenant, his executors and administrators, may bring an action of account against such receiver, and recover such sum as he has received exceeding his due proportion," Gen. St. Rev. 1875, Ch. 17, Pt. 1, § 4.

In Illinois the liability of the occupying tenant under the statute of that State was considered in the very recent case of *Wooley v. Schrader*, 116 Ill. 29, and the occupying tenant was held responsible for a reasonable rent. MULKEY, C. J., in delivering the opinion of the court, said: "Our own statute relating to the action of account is in the main modelled after the statute of Anne, and in many respects is substantially the same. Our own Act, however, is clearly broader than that Act. Ours makes any cotenant liable who 'shall take and use the profits or benefits' of the common estate 'in greater proportion than his or her interest,' liable to account. The word 'take' does not occur in the English statute, and much significance is attached to its absence by Lord COTTENHAM in *Henderson v. Eason*, 17 Ad. & Ell. (N. S.) 701, the leading English case on the subject." Then, after stating the prevailing English and American rule, the learned Judge continued, "but where, as in our own State, it [i. e., the statute of Anne] has been adopted with material modifications it has led to corresponding differences in the rulings of the courts of this country. While it was supposed, in the case just cited, that an attempt to extend the statute of Anne to cases where there had been a mere enjoyment of benefits would lead to 'insuperable difficulties,' yet by the express terms of our own Act the tenant is required to account to his cotenants for 'benefits' as well as profits, and we fail to perceive any difficulty in giving effect to this provision of the statute that may not arise in any case where the value of anything is to be ascertained from the opinions of witnesses or extrinsic circumstances, particularly in a case like the one before us. The farm in question belonged to the four children, 'share and share alike.' It would, as shown by the proof, have readily rented to others at \$315 per annum. Its use was worth just that amount of money. Appellant instead of letting the place to others, and collecting annually that amount of money as rental, and paying over to his brothers and sisters their respective shares, appropriated the entire use of the farm to himself. To the extent of their interest it was in effect appropriating to his own use that amount of money belonging to them, and the question is shall he account for it? We have no hesitancy in saying that he shall. In the language of our own statute, he has taken the 'use' and 'benefits' of their interest in the land, and it is nothing more than simple justice that he should account to them for it." But the charge against the occupier, where he has not disseized his cotenant, is confined to what he has actually realized in the way of use or profit, and he will not be held responsible for what he could have realized by prudent management of the premises, *Sconce v. Sconce*, 15 Ill. App. 169.

Instances of Liability under the Statute.

Bearing in mind the exceptions to the general rule above mentioned, we may refer to some cases showing for what an occupying tenant has and has not been held liable, as falling within the definition of rents and profits. He has been held not liable where he has raised and sold crops, *Hause v. Hause*, 29 Minn. 252; but *semble* otherwise when the crop has not been of his exclusive raising, *Keisel v. Earnest*, 21 Pa. St. 90; but where the character of the land held in common is such that taking directly from its substance is in itself a source of profit, an account must be rendered by the occupying tenant who takes from the soil a part thereof; thus, where the defendant had mined a gold mine, he was held liable to account for the actual profits, *Huff v. McDonald*, 22 Ga. 181, and see the opinion of SHARSWOOD, J., in *Coleman's Appeal*, 62 Pa. St. 252; and it has been held that where a tenant in common cuts logs, they become personality and must be accounted for as such, *Shepard v. Pettit*, 30 Minn. 119. Pay received for pasturage must be accounted for as rent, *Howard v. Throckmorton*, 59 Cal. 79, in which case the court held that the distinction to be made is between "rents and profits *made* by a cotenant in the sole occupancy and rents received from others who, as tenants, have taken the risk of payment, and have mingled their labor with the profits;" and as in case of pasturage the cotenant takes no risk as an agistor, but receives pay varying *per capita* of the cattle pastured, such pay would be, as to him, rent. Where a lease has been made by some of the cotenants, the nonjoining cotenants may take advantage thereof so far as to compel an account of money received thereunder, although not strictly rent; thus where two cotenants made a lease of a building, containing the agreement that the lessee should insure, and the building was burned and the lessors received the insurance money, it was held that they must account therefor to their cotenants, *Stake v. Sikes*, 8 Gray, 609.

In Pennsylvania the question of account, where the taking is from a mine, is regulated by a special statute, Act of April 25, 1850, § 24, P. L. 573, which provides for an account between tenants in common where "coal, iron ore or other mineral shall have been taken from the same by any one or more of said tenants." This Act goes further than the Statute of Anne, which governs as to accounts between other cotenants in Pennsylvania, and compels an account of whatever is taken by one cotenant irrespective of what proportion it bears to his share of the whole. In interpreting the Act, Judge SHARSWOOD said: "It cannot be doubted that its purpose was to give a remedy more liberal and extensive than those afforded either by the common law or the Statute of Anne. The word

take is carefully used instead of *receive*, upon which the restricted construction of that statute is based. . . . It provides that the account shall be taken between all the tenants in one proceeding, and the sum that may be justly and equitably due 'by, from and to them respectively' ascertained. . . . It is argued, however, that before any liability to account can arise, it must appear that the cotenant upon whom the demand for an account is made has actually taken more than his just share or proportion of the entire mine of ore in the beds or banks. It might be enough to say that the Act of Assembly makes no such provision. It applies to any case where coal, iron ore, or other mineral shall be taken from the common property. It does not say or imply more than a just share or proportion. The remedy would be illusory if such a construction should prevail. No one can tell what the just share or proportion of each tenant will be until the whole mine or bank is exhausted of its entire deposit. In such a mass, practically inexhaustible for generations to come, it would make the one ninety-sixth part equal to the other ninety-five, and really destroy to that extent their proportionate value," *Coleman's Appeal*, 52 Pa. St. 252.

It is also held in Connecticut that for mineral taken from a mine the tenant in common must account irrespectively of the value of his share in the whole mine. In *Barnum v. Landain*, 25 Conn. 150, which was the case of a mine divided into twenty-four shares, the court said: "The error of the defendants lies in this: they contend that they own absolutely whatever they get out of the ore bed, if it is not too much, whereas they own only one twenty-fourth part of what they get out, and must account at reasonable times for the other twenty-three parts."

Rule where Cotenant has excluded his Fellow.

It is, of course, to be understood that all that has been so far written with reference to the Statute of Anne applies only to cases in which the occupying tenant has not prevented his cotenant from occupying with him. Where he has so prevented him from occupying, or from obtaining such profits as the premises were capable of yielding, he must account for the profits he has made or pay a fair rental value, *Edsall v. Merrill*, 37 N. J. Eq. 114; or, as it is otherwise expressed, the cotenant excluded is entitled to compensation to the extent of the value of the use of which he has been deprived by the exclusive use of another cotenant of the entire common property, *Osborne v. Osborne*, 62 Tex. 495; and an exclusion of the cotenant may take place even where there is no positive refusal to permit a co-occupation, as where one tenant takes possession of

premises which are not capable of joint occupation, *Davidson v. Thompson*, 7 C. E. Gr. 83, or where the tenant in possession refuses to join his cotenant in an advantageous lease, *Izard v. Bodine*, 3 Stock. 403; but a mere occupation under a mistaken impression as to the extent of the interest of the occupier, there being no active exclusion of the cotenants or demand of possession by them, will not render the occupier liable for a rent for use and occupation, *Sailer v. Sailer*, 41 N. J. Eq. 402.

Proper Action to be brought to recover Rents and Profits.

Account render has been held to be the only action which can be brought to recover rents received; and assumpsit, it has been ruled, will not lie, *Sherman v. Ballou*, 8 Cow. 304; *Irvine v. Hanlin*, 10 S. & R. 219; but it is thought that the reason for so holding has disappeared since the changes in the law of evidence, by which parties are made competent witnesses generally in all forms of action.

Equity may be resorted to, and it is favored in some States even where account render may be well brought, see *Hamilton v. Conine*, 28 Md. 635; and it is held in Vermont that where one of several cotenants wishes an account from the occupying tenant or receiver of rents, and is not joined by the other cotenants, he must go into equity, *Wiswell v. Wilkins* 4 Ver. 137.

Whether all the Cotenants must join in the Action.

Where an action is brought it is held, in some cases, that all the cotenants must join, *Blanton v. Vanzant*, 2 Swan. 276; but see, *contra*, *McCreary v. Ross*, 7 Watts, 483; and a cotenant is expressly allowed to sue alone by the statutes of Maine, *supra*; New Hampshire, *supra*; California Civil Code, § 10, 384, p. 959; Illinois, *supra*; Indiana, *supra*; Michigan, *supra*; Kansas, *supra*; Michigan, *supra*; Wisconsin, *supra*; Minnesota, *supra*; Oregon, *supra*.

Accrued Rent a Debt not an Incident of the Property.

The share of rents and profits recoverable on an account is a debt from one cotenant to the other; and a right thereto having accrued, it will not pass to his grantee on a sale of the creditor tenant's interest in the land. *Hannan v. Osborn* 4 Paige, Ch. 336.

Right of Cotenant arising from Affirmance by him of a Sale of the Property or from Receipt by one Tenant of the Entire Price.

Where a tenant in common sells the common premises, his cotenant, instead of disaffirming the sale, may hold him accountable for the money received therefor; and where both sell and one receives the money, the receiver will be liable to account to his cotenant therefor, and assumpsit will lie to recover the amount, *Fisher v. Kinaston*, 18 Verm. 489; *Coles v. Coles*, 15 Johns. 159; *Wright v. Wright*, 59 How. Pr. 176; and he may be held accountable even if the consideration for the land sold be not paid in money, *Miller v. Miller*, 7 Pick. 133; and it may be stated, as a general rule, that where a tenant in common receives money for the common property, whether by design or mistake, he will be liable to his cotenant in assumpsit for the proper share thereof, *Miller v. Miller*, 9 Pick. 34; *Dickinson v. Williams*, 11 Cush. 258; but where the sale is with the consent of the cotenant, or is ratified by him, the liability of the selling cotenant will extend only to the amount actually received by him, unless he be shown to have acted in bad faith, *Lewis & Nelson's Appeal*, 67 Pa. St. 153.

The same rule of accountability applies where land is taken for public use, and one of the cotenants receives all the money appropriated to pay for the land, *Brinckerhoff v. Wemple*, 1 Wend. 470, but the mere fact of a tenancy in common does not require a tenant, where land is so taken and advertisement is made that all having an interest shall come in, claim and receive their shares of the condemnation money, to see that the rights of his cotenant, who neglects to come in, are protected; and hence where a tenant in common of land receives a gross payment there will be no presumption that any of the money was received to the use of his cotenant, *Howard v. Donahue*, 60 Cal. 264.

Rule of Accountability where the Tenancy in Common arises from a Levy.

The rule of accountability as bailiff applies where one of several creditors who have levied on a debtor's land, is in possession, and takes the rents and profits, *Wiswall v. Wilkins*, 5 Vt. 87.

Accountability for Destruction or Carrying away of Trees in New Hampshire.

In New Hampshire, under the Comp. Stat., Ch. 191, § 6, the liability of one cotenant to another is extended to cases in which a cotenant destroys,

cuts or carries away trees from the common property, and "any cotenant" may recover by action of assumpsit, against any one or more of his cotenants, his just share of the value of any "such trees;" but this Act does not authorize a joint action by several cotenants, *Mooers v. Bunker*, 29 N. H. 420.

Trespass Quare Clausum Fregit not maintainable between Tenants in Common.

Trespass quare clausum fregit will not lie between tenants in common, *Jones v. Chiles*, 8 Dana, 163; *Doe ex d. Halford v. Tetherow*, 2 Jones L. 393; *Duncan v. Sylvester*, 13 Me. 417; *Bennet v. Bullock*, 35 Pa. St. 364; *Wright v. Chandler*, 4 Bibb. 422; *McPherson v. Seguine*, 3 Dev. L. 153; *Wait v. Richardson*, 33 Vt. 190 (in this case the court observed that the language of WILLIAMS, C. J., in *Kirby v. Mayo*, 13 Vt. 103, to the effect that a cotenant's possession might become so strictly adverse as to render him liable to be treated as a trespasser and to be proceeded against as such, was *obiter dicta* and unnecessary, since *Kirby v. Mayo* was an action of ejectment), *McGehee's Adm'r v. Peterson*, 57 Ala. 333, and see *Anders v. Anders*, 2 Dev. Law, 529; *Anders v. Meredith*, 4 D. & B. Law, 199, or by the lessee of a cotenant against the other, *Harman v. Gartman*, Harp. Law, 430; and the action will not lie even where one tenant in common, denying the other's title but not excluding him from possession, carries off timber, *Filbert v. Hoff*, 42 Pa. St. 97; and one tenant in common cannot maintain trespass in an action to try titles against his cotenant or one entering by his authority, *Martin v. Quattebam*, 3 McCord, 205; *Harvin v. Hodge*, Dudley L. 23; *Taylor v. Stockdale*, Id. 302; *aliter* in California, *Ross v. Heintzen*, 36 Cal. 315.

Action for Destruction of Common Property or for Tortious Misuser.

An action may, however, be brought where the common property is destroyed by one cotenant, *Maddox v. Goddard*, 15 Me. 218; *Symonds v. Harris*, 51 Id. 14, and the destruction to sustain such an action need not be total, *McLellan v. Jenness*, 43 Vt. 183; thus a tenant in common may maintain case against his cotenant who has diverted water from the common mill for his own use, *Pillsbury v. Moore*, 44 Me. 164; *Blanchard v. Baker*, 8 Greenl. 253; and an action may be maintained for a tortious misuser, *McLellan v. Jenness*, *supra*, as where the tenant in common of a mill erects a dam and thereby flows the common property, *Odiorne v. Lyford*, 9 N. H. 502, in which case it was said by PARKER, C. J.,

"The act of the defendant in flowing the common property in this case, if without right, is not a mere entry and possession as a tenant in common, subjecting him to account for the profits, but is an act which tortiously deprives plaintiff of the use of the property and is in the nature of a destruction of the use for which it was intended."

It is however to be noticed that in *Bennet v. Bullock*, 35 Pa. St. 364, WOODWARD, J., was of opinion that a total destruction was necessary to sustain trespass between tenants in common; as, however, the objection to the form of action had not been properly taken the Supreme Court affirmed the judgment of the court below.

Case has been allowed where, through the negligence of one tenant in common, common property has been destroyed, *Chesley v. Thompson*, 3 N.H. 9.

Forcible Entry and Detainer.

As a rule one tenant in common cannot, before partition, maintain forcible entry and detainer against his fellow, *Lick v. O'Donnell*, 3 Cal. 59.

But the law is otherwise in Illinois, *Mason v. Finch*, 2 Ill. 495, and Massachusetts, *Presbrey v. Presbrey*, 13 Allen, 281.

Waste—Statute of Westminster II.

Prior to the statute of Westminster II. there was no liability, on the part of the tenant in common to his cotenant, for waste; that statute, however, subjected him to a liability therefor, and he is so liable in all of the United States; while, however, he is not allowed to commit waste, *Murray v. Haverty*, 70 Ill. 318; *Elwell v. Burnside*, 44 Barb. 447; and while case may be maintained against him for such commission, *Anders v. Meredith*, 4 D. & B. L. 199; yet it is held that trespass will not lie, *Id.*; and see *McGehee v. Peterson*, 57 Ala. 333; but see, *contra*, *Hubbard v. Hubbard*, 15 Me. 198; *Murray v. Haverty*, 70 Ill. 318.

An injunction to stay waste on the part of a tenant in common may be obtained; but as a general rule such equitable interposition will be refused, *Obert v. Obert*, 5 N. J. Eq. 397; *Hihn v. Peck*, 18 Cal. 640; *Dodd v. Watson*, 4 Jones Eq. 48; *Ballou et al. v. Wood et al.*, 8 Cush. 48; a proper case for equitable interposition is held to be one in which an injunction is necessary to protect the common property from total ruin; thus, in *Ballou v. Wood*, the common property was a reservoir; a majority of the owners, who were associated together under articles, were letting the water run off; it was held that, on a bill filed by the minority of the

owners, the court would enjoin the majority from letting the water run off, and that the right of the majority to control the common property, under the articles of association, was confined to a right to control the drawing off of the water for the use of the persons interested, and did not extend to a right to waste.

It has been held that an excessive use of land will not render the occupying cotenant liable for waste, or to an action of case in the nature of waste, although he by such use wear out the land and the land is, thereby, permanently injured and made of less value, or even if he remove part of the soil, as where he takes off marl, *Darden v. Cowper*, 7 Jones L. 210. The latter part of this ruling seems to be doubtful law; as authority for it the learned Judge, who delivered the opinion in *Darden v. Cowper*, cited *Smith v. Sharpe*, Busb. 91; but an examination of that case will show that its citation is misleading, and that it does not sustain the position taken in *Darden v. Cowper*, which was an action for waste in wearing out the ground by a succession of crops, for *Smith v. Sharpe* was a case of tenancy in common of a fishery, and it appeared that the taking of marl from its banks, which was the waste complained of, did not injure the fishery *qua* fishery; and, in delivering the opinion in the case, NASH, C. J., said: "In the case we are considering we hold that the plaintiff cannot maintain his action, because as a fishery the land is neither injured in value, nor destroyed, but improved. For the value of the marl removed the defendant is, no doubt, bound to account, but not in this action."

It is not waste, in the absence of a statutory provision so enacting, for a tenant in common to cut, or to license the cutting of, trees proper to be felled, *Baker v. Wheeler*, 8 Wend. 505; *Alford v. Bradeen*, 1 Nev. 228. And, ordinarily, a sale of timber cut by one tenant in common will pass a good title to the vendee, so that replevin will not lie against him for the timber cut, *Alford v. Bradeen*, *supra*; and the other tenants in common must resort to their statutory action against their cotenant for an account, see *supra*. But timber has been protected as between cotenants by statute in several States; thus, in Pennsylvania, by Act of May 4, 1869, Purd. Dig. 1467, it is rendered unlawful for a cotenant to cut timber growing on the common property, and the federal Circuit Court, sitting within Pennsylvania, has held that the effect of the statute is to prevent the passage of title where a sale of timber, so unlawfully cut, is made, and that the timber will be still regarded as realty, *Duff v. Bindley*, 16 Fed. Rep. 178. The Act does not, however, so extend the operation of the Act of March 29, 1824, 8 Sm. Laws, 283, as to render the cotenant, unlawfully cutting timber, liable to the penalty of treble damages, which in the Act of 1824 is pro-

vided in the case of cutting and converting timber-trees growing on the lands of another, *Wheeler v. Carpenter*, 107 Pa. St. 271. Timber is also protected against the unlawful cutting by tenants in common in New Jersey, Rev. St. (1877), p. 246, pl. 106; New Hampshire, Gen. L. (1878), Tit. 26, Ch. 220, § 3, p. 509, and perhaps in some other States. In Maine and Massachusetts a tenant in common is declared guilty of waste, and liable to triple damages, if he cut trees without giving thirty days' notice of his intention to improve to all interested persons (including mortgagees) or their agents, Maine, Rev. St. (1883), Ch. 95, § 5, p. 789; Massachusetts, Pub. Stat. (1882), Ch. 179, § 6, p. 1038.

In *Murray v. Haverty*, 70 Ill. 318, it was held waste to license the mining of coal from the common property, and trespass was sustained against the licensee who had acted upon the license, but this decision rests upon the Illinois statute allowing one tenant in common to maintain trespass against his fellow, who takes away, destroys, lessens in value or otherwise injures the common property, and, besides, it does not appear from the report whether the coal were taken from an opened mine or not; probably under the view taken by the court of the effect of the statute, this consideration became immaterial. It is thought, however, that, as between tenants in common the ordinary rule of waste in the case of mines should apply, *i. e.*, that while it may be waste to open new mines, or to convert land formerly used for other purposes into mines, yet the mere working of an opened mine, while it will render the tenant in common liable to account to his cotenant for the profits thereby made, is not waste, *M'Cord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134.

Rule of Possession as between Cotenants—Ouster.

While, as a general rule, as between the tenants themselves, the possession of one tenant in common is the possession of all, *Knox v. Sillway*, 1 Fairf. 201; *Shumway v. Holbrook*, 1 Pick. 114; *Barnard v. Pope*, 14 Mass. 434; *Johnson v. Toulmin*, 18 Ala. 50; *Blakeney v. Ferguson*, 20 Ark. 547; *Young v. Adams*, 14 B. Mon. 127; *Owen v. Morton*, 24 Cal. 373; *Colman v. Clements*, 23 Id. 245; *German v. Machin*, 6 Paige, 288; *Allen v. Hall*, 1 McCord, 131; *Den ex d. Black v. Lindsay*, Bush. 467; *Willison v. Watkins*, 3 Pet. 43; *Wilson v. Peelle*, 78 Ind. 384; *Stevens v. Wait*, 112 Ill. 544; *Cooter v. Dearborn*, 115 Ill. 509; *Warfield v. Lindell*, 38 Mo. 561; *Den ex d. Cloud v. Webb*, 3 Dev. L. 317; *Keil v. West*, 21 Fla. 508; *Franks v. Hancock*, 1 Posey, 555; and this is the case when the title is equitable as well as when it is legal, *Poage's Heirs v. Chinn's Heirs*, 4 Dana, 50; yet one tenant in common may oust his fellow and maintain an adverse possession, in which case the ousted tenant

may bring ejectment, *Hoffstetter v. Blattner*, 8 Mo. 276; *McClung v. Ross*, 5 Wheat. 116; *Harpending v. Reformed Dutch Church*, 16 Pet. 455; *Den ex d. Johnson v. Swain*, Bush. 335; *Leeper v. Neagle*, 94 N. C. 338; *Mason v. Finch*, 1 Scam. 495; *Dexter v. Arnold*, 3 Sumn. 152; *Gillaspie v. Osburn*, 3 A. K. Mar. 77; *Barnitz v. Casey*, 7 Cranch, 456; *Carpenter v. Thayer*, 15 Vt. 552; *Chiles v. Conley*, 9 Dana, 385; *Taylor v. Hill*, 10 Leigh, 457; *Den ex d. Midford v. Hardison*, 3 Murph. 164; *Abercrombie v. Baldwin*, 15 Ala. 363; *Kearnes v. Hill*, 21 Fla. 185; and the ouster which will sustain an action may be from a portion only of the land held in common, *Carpentier v. Gardiner*, 29 Cal. 160; *Carpentier v. Webster*, 27 Id. 524.

It is often said that, to justify ejectment against a tenant in common, the ouster of which he has been guilty, must have been an actual ouster, *Liscomb v. Root*, 8 Pick. 376; *Cutts v. King*, 5 Me. 482 (this case was decided upon the Maine statute of 1826, ch. 344); *Coleman v. Hutchinson*, 3 Bibb, 209; *Story v. Saunders*, 8 Humph. 663; *Jones v. Massey*, 14 So. Car. 292; *Buchanan v. King's Heirs*, 22 Gratt. 414.

But this is not to be taken in the sense that to sustain the action there must be proved a forcible turning out of the plaintiff, see the remarks of Lord MANSFIELD in *Doe v. Prosser*, 1 Cowp. 217; *Owen v. Morton*, 24 Cal. 373; *Gale v. Hines*, 17 Fla. 773; *VanBibber v. Frazier*, 17 Md. 436, but rather as meaning that such a state of affairs must appear to exist as shows that the tenant in possession has excluded and continues to exclude his cotenant from the common possession and enjoyment of the common property, and maintains his exclusive possession, under an adverse claim and without any intent to account for his possession to his tenant in common or to hold it for him, as said by BUTLER, J., in *Newell v. Woodruff*, 30 Conn. 492, "It is sometimes said that as between tenants in common an *actual ouster* must be proved in all cases. But the difference is only in the kind of evidence by which it may be proved in the two cases. As against a cotenant it cannot be proved merely by acts which are consistent with an honest intent to acknowledge and conform to the rights of the cotenant although such acts might be sufficient evidence of an ouster between the parties if there was no tenancy in common and each claimed the whole." The rule has been sometimes thus expressed—actual ouster must be proved or such circumstances as would support a presumption of ouster, *Allen v. Hall*, 1 McCord, 131.

What will constitute Sufficient Evidence of Ouster—No Ouster where Possession is as Tenant in Common.

It becomes of some interest to determine what evidence will, in the eye of the law, be sufficient to establish such an ouster as will be a foundation for an action.

And first there can be no ouster or evidence thereof while the possession is that of a tenant in common *eo nomine*, *Clapp v. Bromaghams*, 9 Cow. 530, and the mere silent exclusive possession of the whole of the common property, unaccompanied by any act which gives notice of an intent to exclude the other cotenant from possession, will not constitute an ouster or an adverse possession, *McClung v. Ross*, 5 Wheat. 116; *Willison v. Watkins*, 3 Pet. 51; *Blakeney v. Ferguson*, 20 Ark. 547; *Owen v. Morton*, 24 Cal. 373; *Abercrombie v. Baldwin*, 15 Ala. 363; *Northrop v. Wright*, 24 Wend. 221; *Squires v. Clark*, 17 Kan. 84; *Berthold v. Fox*, 13 Minn. 501; *Small v. Clifford*, 38 Me. 213; *Challefoux v. Ducharme*, 8 Wisc. 287.

Sole Entry of one Tenant in Common presumably for the Benefit of All.

And a mere sole entry either by one tenant under a deed or instrument which creates a tenancy in common, *Robidoux v. Cassilegi*, 10 Mo. App. 516; *Gossom v. Donaldson*, 18 B. Mon. 230; *Doe ex d. Linker v. Benson*, 67 N. C. 130; or by one of several heirs, *Hart v. Gregg*, 10 Watts. 185; *Tulloch v. Worrall*, 49 Pa. St. 133, will presumably be for the benefit of all the tenants in common or coheirs, and when an heir, who was in possession at the time of the death of the ancestor, continues in such possession, his possession is presumptively that of all the heirs. *Ball v. Palmer*, 81 Ill. 370.

Ouster a Question for the Jury.

In considering what acts may be held to constitute an ouster, it must be remembered that the question of ouster as between cotenants is one to be decided by the jury, for the law will not presume an ouster, *Cummings v. Wyman*, 10 Mass. 464; *Blackmore v. Gregg*, 2 W. & S. 182; and so far has this doctrine been carried that, in a case where the jury found, by a special verdict, facts which would have justified them in finding an ouster, the court held that no ouster had been found, *SERGEANT, J.*, saying: "In the absence of all explanation the court would be justified in directing or advising the jury to infer a conversion or an ouster in a case

like the one at bar, from the fact of demand and refusal; but the inference must be made by the jury and not by the court," *Carpentier v. Mendenhall*, 28 Cal. 484. In *Elliott v. Morris*, Harp. Eq. 281, where Chancellor DESAUSSURE passed upon the question of ouster, he was careful to say that he should have taken the opinion of a jury upon the matter but that the counsel on both sides desired a speedy decision and to save the delay of directing an issue at law. In New York, in *Van Dyck v. Van Beuren*, 1 Caines, 84, the court drew the inference of ouster; but from the opinion of SUTHERLAND, J., *Jackson ex d. Bradt v. Whitbeck*, 6 Cow. 632, may be drawn the inference that the Supreme Court did not consider the question settled; still, as in that case there was a verdict subject to the opinion of the court on the facts, and the court held that it might find an ouster on the same facts that would have justified a jury in finding one, the result would not seem to be essentially different from allowing an inference of law where the jury had declined to draw one of fact. But while an ouster or disseizin cannot be presumed from mere entry or peaceable possession, yet the entry or possession may be accompanied with such acts as show that the claim of the occupier is exclusive, in which case, if the claim be notorious, the possession may become adverse, *Ricard v. Williams*, 7 Wheat. 121; as where the entry is made with a declaration, of which the cotenant has notice, that it is for the exclusive benefit of him making entry, *Shumway v. Holbrook*, 1 Pick. 114.

Act giving rise to Adverse Possession must be Unequivocal.

The act which causes such adverse possession to arise must be of an unequivocal character, for the law will always refer a possession to a rightful title rather than to a tortious act; and, therefore, no act which can reasonably be referred to a possession as cotenant will be regarded as showing an ouster; the cotenant may, therefore, in addition to his possession, exercise acts of ownership over the corpus of the common property without becoming an ouster. As said by BLACK, C. J., to render the possession an ouster the possession must be "notorious and continued possession, unequivocally hostile," *Peck v. Ward*, 18 Pa. St. 506; *Johnson v. Toulmin*, 18 Ala. 50. Merely cutting timber occasionally is not sufficient to be evidence of ouster, *Peck v. Ward, supra*; for the cutting will be presumed to be in the exercise of the cotenant's right, *Whiting v. Dewey*, 15 Pick. 428; and this has been held where the cutting had taken place during twenty years, it not having been done every year and knowledge thereof not having been brought home to the co-owner, *Ewer v. Lowell*, 9 Gray, 276; and see *Chandler v. Ricker*, 49 Vt. 128; building a

fence about the common property is not such an exclusion of the cotenant as, without more, will authorize an ejectment, *Yager v. Larsen*, 22 Wisc. 184; but the erection, on the land held in common, of a permanent structure for the exclusive use of the builder, is evidence of an ouster, *Bennett v. Clemence*, 6 Allen, 10; but it is otherwise if the occupation be for a temporary purpose, e. g., piling boards and lumber, *Keay v. Goodwin*, 16 Mass. 1. Taking possession and carrying on extensive quarrying operations on the land will amount to an ouster, because such action amounts to a destruction or taking away of the subject of the tenancy itself, *Warfield v. Lindell*, 38 Mo. 561.

It is said in some cases that the intention to exclude the cotenant must be manifested by acts, and that mere declarations will not be sufficient to show an ouster, *Colman v. Clements*, 23 Cal. 245; *Humbert v. Trinity Church*, 24 Wend. 517; *Doe ex d. Linker v. Benson*, 67 N. C. 150; but it is thought that a very slight act, accompanied by possession and a declaration of the meaning of the act, if brought home to the notice of the cotenant, will be sufficient to show an ouster.

When Appropriation of Rents or User will be Evidence of Ouster.

A mere perception of the rents and profits will not be evidence of an ouster, *Morris's Lessee v. Vanderen*, 1 Dall. 64; *Allen v. Hall*, 1 McCord, 131; *Johnson v. Toulmin*, 18 Ala. 50; *Chambers v. Chambers*, 3 Hawks, 232; *Forward v. Deetz*, 32 Pa. St. 69; *Robidoux v. Cassilegi*, 10 Mo. App. 516; *Higbee v. Rice*, 5 Mass. 344; *Lloyd v. Gordon*, 2 Har. & McH. 254; *Hart v. Gregg*, 10 Watts, 185; *Susquehanna and Wyoming Valley R. R. v. Quick*, 61 Pa. St. 328; *Norris v. Gould*, 15 W. N. C. 187; but an appropriation of the entire profits or use of the premises, under a notorious claim of exclusive right, may be equivalent to ouster, *Parker v. Proprietors*, 3 Metc. 102; *Manchester v. Doddridge*, 3 Ind. 360; *Owen v. Morton*, 24 Cal. 373; *Small v. Clifford*, 38 Me. 213; *Dexter v. Arnold*, 3 Sumn. 152; *Grim v. Dyar*, 3 Duer, 354; *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177.

Ouster Inferrible from Refusal to let Cotenant into Possession.

Where the defendant being in possession refuses the demand of his cotenant to be let in and denies his title, such action will justify the finding of an ouster, *Siglar v. Van Riper*, 10 Wend. 419; *Jefcoat v. Knotts*, 13 Rich. 50; *Brackets v. Norcross*, 1 Me. 89, as said by BUTLER, J., in *Newell v. Woodruff*, 30 Conn. 492, "a refusal furnishes that clear evidence of ouster which a demand and refusal furnish of a conversion in

trover;" but the refusal must be distinct, therefore, where a person, who was in possession of land which he had bought, was waited on by one who was entitled, as tenant in common, to a share thereof, and who read to him his deed and claimed his said share, to which the purchaser replied, "Yes, it is hard to pay twice," it was held that there was no evidence of an ouster, *Calburn v. Mason*, 25 Me. 434; and see *Thomas v. Pickering*, 13 Me. 337; *Abercrombie v. Baldwin*, 15 Ala. 363; *Greer v. Tripp*, 56 Cal. 209; *Norris v. Sullivan*, 47 Conn. 474; and, to make the refusal evidence of ouster, the occupying cotenant must be informed of the claimant's title; thus, where a cotenant demands *all* instead of his moiety, or claim is made by an alienee of the cotenant, without specifying the title under which he claims, a refusal is not evidence of ouster, *Den d. Meredith v. Andres*, 7 Ired. Law, 5; the weight of the evidence derived from a refusal is strengthened when the defendant holds possession after a demand and subsequently purchases a hostile title and sets it up, *Clark v. Crep*, 47 Barb. 59; S. C., 51 N. Y. 646; and see *Phelan v. Kelly*, 25 Wend. 395; denial of title, which will be evidence of ouster, may be by way of answer or plea in the course of legal proceedings instituted to recover possession of the premises, *Greer v. Tripp*, 56 Cal. 209; *Spect v. Gregg*, 51 Id. 198; *Noble v. M'Farland*, 51 Ill. 226; *Withrow v. Biggerstaff*, 82 N. C. 82; *Lyford v. Thurston*, 16 N. H. 399; and the ordinary confession of ouster in an action of ejectment is sufficient to have this effect, *Van Bibber's Lessee v. Frazier*, 17 Md. 436; and a defendant cotenant who wishes to deny ouster should take a rule to confess lease and entry, and *not* ouster, Id. It is, however, to be noted in this connection that ouster cannot be founded upon a mere denial of title, *Filbert v. Hoff*, 42 Pa. St. 97.

Conversion of Amicable to Adverse Possession.

A possession which has begun peaceably may become adverse through notorious acts and claims, *Millard v. M'Mullin*, 68 N. Y. 345; *Abercrombie v. Baldwin*, 15 Ala. 363; but when a disclaimer is relied on by the occupier as changing the character of the possession, he must bring notice of the disclaimer home to his cotenant, *Boggess v. Meredith*, 16 W. Va. 1; and the claim of title by the occupier must be clear and distinct; thus, where the lessee of one cotenant told the son of another cotenant that he, the lessee, had more right on the premises than the son, it was held to afford no evidence of ouster, *Campau v. Campau*, 45 Mich. 367; and the declaration by a widow and a coheir in possession that another coheir was the owner of the land, and could turn them out, was held no evidence of pos-

session, on the part of the coheir spoken of, adverse to the other coheirs, *Forward v. Deetz*, 32 Pa. St. 69.

In *Doe ex d. Linker v. Benson*, 67 N. C. 150, the court went so far as to say that no mere subsequent claim to the whole would make the tenant's possession adverse, but that an act was required. It is thought that a disclaimer duly brought home to the notice of the tenant claimed to be ousted would be an *act* within the meaning of the rule laid down.

Mortgage of the Estate not necessarily an Ouster.

A tenant in common may even go so far as to mortgage the whole estate without being guilty of ouster, *Wilson v. Collishaw*, 13 Pa. St. 276; *Leach v. Beattie*, 33 Vt. 195; *Hodgdon v. Shannon*, 44 N. H. 572; to render the mortgage an ouster, or evidence thereof, the cotenant out of possession must know of it, and know also that it was executed under a claim to the whole estate; and it must be followed by such acts of possession as would exclude the inference of an acknowledged continuing right in the cotenant, *Leach v. Beattie, supra*; and, in any event, the question of the intent with which the mortgage is made is for the jury, *Moore v. Collishaw*, 10 Pa. St. 224.

Conveyance may not be an Ouster—But if followed by Entry with Claim of exclusive Right an Ouster may be found.

The mere making of a conveyance, either of the whole or of a part of the land, by one tenant in common will not amount to an ouster of his fellows, *Hume v. Long*, 53 Iowa, 299; *Hannon v. Hannah*, 9 Gratt. 146; *Day v. Howard*, 73 N. C. 1; *Buchanan v. King's Heirs*, 22 Gratt. 414; *Culver v. Rhodes*, 87 N. Y. 348. In the case of *Thomas v. Pickering*, 13 Me. 337, it is true, the court said that a sale to a stranger by metes and bounds, with a warranty deed, constituted an ouster, WESTON, C. J., saying "the conveyance was an unequivocal ouster of his cotenant from that part of the land and a claim of sole seizin in himself;" but it is thought that this assertion is unsustained by the authorities; and it certainly was not required by the facts of the case, since there had been a possession taken by the grantee; but if the deed or conveyance be followed by an entry by the grantee, with a claim of exclusive right, an ouster may be well found by a jury, *Parker v. Proprietors of Locks and Canals*, 3 Metc. 91; *Clapp v. Bromaghams*, 9 Cow. 530; *Ricard v. Williams*, 7 Wheat. 121; *Marcy v. Marcy*, 6 Metc. 360; *Kittredge v. Proprietors of Locks and Canals*, 17 Pick. 246; *Blossom v. Brightman*, 21 Id. 285; *Nichols v. Smith*, 22 Id. 316; *Bigelow v. Jones*, 10 Id. 161; *Rising v. Stannard*, 17 Mass.

282; *Jewett v. Stockton*, 3 Yerg. 492; *Jeffers v. Radcliff*, 10 N. H. 242; *Burton v. Murphy*, 2 Tayl. 259; *Doe ex d. Horne v. Howell*, 46 Ga. 9; *Kinney v. Slattery*, 51 Iowa, 353; *Nelson v. Davis*, 35 Ind. 474; *Bogardus v. Trinity Church*, 4 Paige, 178; *Jackson ex d. Preston v. Smith*, 13 Johns. 406; but it is held that to constitute an ouster the possession must be such as to show an intent to hold the entire tract exclusively of the cotenant, and not such as would be consistent with a holding as grantee of the conveying cotenant's interest, *Holley v. Hawley*, 39 Vt. 525; for, presumptively, the conveyance of the cotenant will constitute his grantee a tenant in common, and the remaining tenant in common has a right to regard the possession as for his benefit, *Day v. Howard*, 73 N. C. 1; and if a conveyance by one tenant in common profess to be made with the consent of the cotenant, then, although the conveyance be of the whole property, there is no ouster, even if the grantee enter upon the whole, *Sewell v. Holland*, 61 Ga. 608.

Purchase of Cotenant's Share at Sheriff's Sale.

If one cotenant purchase another's share at sheriff's sale an ouster may be found, *Jackson ex d. Krom v. Brink*, 5 Cow. 483.

Necessity of Knowledge on the part of a Cotenant where it is sought to affect him by an Adverse Possession.

We have several times alluded to the necessity of knowledge, on the part of the alleged ousted cotenant, of the acts said to constitute the ouster, before an ouster can be inferred; and it may be stated as the rule that in all cases the cotenant must have knowledge of the ouster or disseizin before an adverse possession can be alleged as against him; the knowledge must be either brought home to him or the occupier must make his possession so visibly hostile, notorious and adverse as to justify an inference of knowledge on the part of the tenant sought to be ousted or disseized, and of laches on his part should he, under such circumstances, fail to assert his rights, *Chandler v. Ricker*, 49 Vt. 128; *Clymer v. Dawkins*, 3 How. 689; *Lodge v. Patterson*, 3 Watts, 77; *Law v. Patterson*, 1 W. & S. 184; *Prescott v. Nevers*, 4 Mason, 380; *Warfield v. Lindell*, 38 Mo. 561; *Grand Tower Mining, Manufacturing and Transportation Co. v. Gill*, 111 Ill. 541; *Trustees v. Kirk*, 84 N. Y. 220; *Hawk v. Senseman*, 6 S. & R. 21; *Thomas v. Hatch*, 3 Sumn. 170; *Zeller's Lessee v. Eckert*, 4 How. 289; *Barr v. Gratz*, 4 Wheat. 213; *McClung v. Ross*, 5 Id. 127; *Long v. Mast*, 11 Pa. St. 189; *Culver v. Rhodes*, 87 N. Y. 348; in the last cited case, FINCH, J., in a very able and learned opinion, reviews the authorities

and shows that the doctrine enunciated in the syllabus of *Jackson v. Smith*, 13 Johns. 406, viz., that possession of a lot under a deed given for the entire lot, without right in the grantor, is adverse to the rightful owner, although he be a tenant in common with the grantor—is not warranted by the report of the case itself, and is not sustained by the authorities. And in a case where the tenant in common maintained his possession, took a deed from an adverse claimant, and claimed the whole of the land for himself, it was held that the ouster of the cotenant took place only from the time of actual or constructive notice to him, *Packard v. Johnson*, 57 Cal. 180; *McKINSTERY, J.*, saying, “When was the plaintiff ousted? From the moment the defendant began to claim the land as exclusively his own? Not so; but from the point of time when plaintiff became aware of such claim or (at the very least) from the time when as a prudent man, reasonably attentive to his own interests he ought to have known that his cotenant asserted an exclusive right to the land of which both had had the common possession.” This position well agrees with the doctrine enumerated in other California cases that the tenant in common has a right to assume that the possession of his cotenant is for both until informed of the contrary by express notice or acts and declarations equivalent thereto, see *Miller v. Myers*, 46 Cal. 535; *Aguirre v. Alexander*, 58 Id. 21.

But there are cases in which from a very long possession, accompanied by circumstances which render it probable that the other tenants had notice, an ouster may be inferred. In *Jackson ex d. Bradt v. Whitbeck*, 6 Cow. 632, it was held that from an exclusive possession of forty years by one son of the deceased owner of the land, claiming to hold for himself alone, ouster might be inferred by the jury as against his brothers, who had during the time of his possession lived within forty miles of the premises in dispute, and see *Van Dyck v. Van Beuren*, 1 Caines, 84, where the court drew the inference.

Statutory Regulation of Action by Cotenant in case of Ouster.

In some States the circumstances under which a tenant in common is permitted to sue his cotenant are laid down by statute, thus in Arkansas it is enacted that the plaintiff must show that the defendant actually ousted him, or did some act amounting to a total denial of his right as such cotenant, R. S. (1874), Ch. 51, § 2259, p. 461. To the same effect are the statutes of Michigan, *Howell's Annot. Stat.* (1882), Tit. 31, Ch. 269, § 7812, p. 1953; Minnesota, Gen. Laws, Ch. 75, § 9, p. 815; Nebraska, Code, C. Proc., Tit. xvii., § 628, p. 714; Wisconsin, R. S., Ch. 133, § 3080, p. 802; Illinois, R. S. (Hurd. 1883), Ch. 45, § 26, p. 497; in Indiana, the plaintiff

must show that the "defendant denied plaintiff's right or did some act amounting to such denial," R. S. (1881), § 1063, p. 203; in Kansas, Code (1881), Ch. 80, § 597 (4135), p. 683, and Ohio, R. S. (1884), Tit. 1, D. 7, Ch. 10, § 5783, p. 1215, he must state the same; in Virginia, he must prove "actual ouster or act amounting to total denial of plaintiff's right as cotenant," Code (1873), Tit. 40, Ch. 131, p. 960; in Georgia, it is provided that there can be no adverse possession until after an actual ouster, or, where the possession is exclusive, after demand or express notice of adverse possession; when an adverse possession has so arisen the cotenant may sue, Code (1882), § 2303, p. 565.

Trespass maintainable in case of Forcible Ouster.

In case of an actual (forcible) ouster, the oustee may maintain trespass, *McGill v. Ash*, 7 Pa. St. 397; *Trauger v. Sassaman*, 14 Id. 514; *Erwin v. Olmsted*, 7 Cow. 229; and he may recover damages which grow out of and are incidental to the ouster upon which the recovery rests, *Carpentier v. Mitchell*, 29 Cal. 332.

Tenant in Common does not Forfeit his Estate by Ousting his Cotenant—Limitation of latter's Recovery.

A tenant in common does not forfeit his right by ousting his cotenant and the latter's recovery will be only according to his interest, *Warren v. Adm'rs of Henshaw*, 2 Aik. (Vt.) 141; and an oustee has, in a proper case, even been allowed for improvements made by him, *Bracket v. Norcross*, 1 Me. 89; *Lane v. Harrold*, 72 Pa. St. 267; *Hare v. Fury*, 3 Yeates, 13; *Chambers v. Lapsley*, 7 Pa. St. 24; *Bennet v. Bullock*, 35 Id. 364; *Critchfield v. Humbert*, 39 Id. 427; *Norris v. Gould*, 15 W. N. C. 187.

Mesne Profits.

After a recovery in ejectment the tenant in common can maintain an action for mesne profits; but he must proceed to obtain possession of the premises within a reasonable time; he cannot lie by and charge the occupier as a trespasser; thus in *Hare v. Fury*, 3 Yeates, 13, the plaintiff, a tenant in common, recovered judgment in ejectment May 9, 1791; on September 10, 1795, he issued a writ of trespass for mesne profits; the court considered that a month was a reasonable time within which to have issued such a writ and restricted the plaintiff's recovery to profits accruing between September 10, 1789, and June 9, 1791. After an ouster and disseizin, the disseizee has been allowed to recover the yearly value of the land irrespec-

tive of profits, *Sears v. Sellew*, 28 Iowa, 507; *Austin v. Barrett*, 44 Id. 488; and the disseizor will not, as a rule, be allowed contribution for improvements made by him, *Mumford v. Brown*, 6 Cow. 475; *Doane v. Badge*, 12 Mass. 65; *Dech's Appeal*, 57 Pa. St. 467; *Stevens v. Thompson*, 17 N. H. 103.

Statute of Limitations as between Tenants in Common—What will show Adverse Possession.

Naturally following the consideration of ouster, the question arises whether a title can be acquired through the operation of the Statute of Limitations, as between persons who have borne to each other the relation of tenants in common, and, as a necessary sequent, comes the consideration of the circumstances under which the bar of the statute will be held to have attached.

Of course to start the running of the statute there must be an adverse possession, from the inception of which the time prescribed by the statute must be calculated, *Story v. Saunders*, 8 Humph. 663; *Dryden v. Newman*, 116 Ill. 186, for the law will always refer the possession of a tenant in common to his cotenancy rather than to an ouster, *Thomas v. Patten*, 13 Me. 329, but where adverse possession has been established the statute will run and will be a bar to a recovery even as against a cotenant, *Terrill v. Murry*, 4 Yerg. 104; *Gillaspie v. Osburn*, 3 A. K. Mar. 77.

As a general rule, it may be stated that an adverse possession will not be inferred from mere long possession, unaccompanied by circumstances showing its adverse character, *Catlin v. Kidder*, 7 Vt. 12; *Purcell v. Wilson*, 4 Gratt. 16 (in this case there had been possession for twenty-eight years), *Van Bibber's Lessee v. Frazier*, 17 Md. 436; *Challefaux v. Ducharme*, 4 Wisc. 554; and in *Tulloch v. Worrall*, 49 Pa. St. 133, where the lower court allowed the jury to infer an ouster after a possession of twenty-one years and payment of taxes during that time, the judgment was reversed for that cause, and see *Phillips v. Gregg*, 10 Watts, 158.

It has been held that merely entering into possession of land, under a deed of the tenant in common purporting to convey the whole tract will not give rise to such an adverse possession as will, if undisturbed, ripen into a good title, *Holley v. Hawley*, 39 Vt. 525; *Roberts v. Morgan*, 30 Id. 319; *Seaton v. Son*, 32 Cal. 481; *Heirs of Marr v. Gilliam*, 1 Cold. 488, for the tenant has a right to suppose that the conveyance was merely of his cotenant's right; and this has been held in a case in which the deed has been recorded, *Holley v. Hawley, supra*; but a sale with an uninterrupted possession for a long series of years and pernancy

of profits during that time, with knowledge of the part of the cotenant and without demand or assertion of title on his part, will furnish evidence from which a jury may, and it is sometimes said, *ought* to infer an ouster and adverse possession, *Lefavour v. Homan*, 3 Allen, 354; *Frederick v. Gray*, 10 S. & R. 182; and open, notorious, uninterrupted possession, accompanied by such acts of ownership as show an intent to exclude others and by a claim of exclusive right, maintained beyond the period of statutory limitation will justify a jury in finding ouster and adverse possession, *Mehaffy v. Dobbs*, 9 Watts, 377; *Law v. Patterson*, 1 W. & S. 184; *Bolton v. Hamilton*, 2 W. & S. 294; *Calhoun v. Cook*, 9 Pa. St. 226; *Keyser v. Evans*, 30 Id. 507; *Rider v. Maul*, 46 Id. 376; *Susquehanna & Wyoming Valley R. R. & Coal Co. v. Quick*, 61 Id. 328. In *Manchester v. Doddridge*, 3 Ind. 360, possession for twenty-five years under a claim of exclusive right, accompanied by improvements, was held evidence of ouster fit to be submitted to a jury. But mere pernancy of profit and improvement where there is no exclusion of the cotenant from such use as the premises are capable of, will not be evidence of adverse possession; and knowledge, actual or constructive, on the part of the tenant not in possession, would seem to be required before the Statute of Limitations can begin to run. In *Ingalls v. Newhall*, 139 Mass. 268, certain brothers were tenants in common of a lot bordering on the sea. One of them, Joseph Ingalls, built a boat-house or fish-house on the common premises, placed there a pump, and rented out the house. He and his devisee received the rents for more than twenty years, paid taxes on the building, but not, *eo nomine*, on the land, and built a wall around the pump land. It appeared, however, that the other tenants in common used the fish-house when they wanted to do so; that the pump was used as a convenience by the whole neighborhood; and that the land about the pump was used as a gathering place for conversation and smoking and as a place where all might draw up their boats. A writ of entry being brought by the tenants in common not in possession, the defendant, the sole heir of Joseph's devisee, claimed under the Statute of Limitations and relied upon the decision in *Lefavour v. Homan*, *supra*; but the court, speaking by STEVENS, J., said: "There was no sole possession so long as the brothers of Joseph Ingalls were permitted to use the land and the structures on the land owned by him. But if possession be sole and with pernancy of profits, this alone, it has often been held, is not evidence of ouster. . . . It is only after this has been continued, with the knowledge of the cotenants, for a long series of years that any presumption begins to arise against them."

There is, however, a number of cases in which a long and undisturbed possession, without explanation, has been considered evidence from which

a jury may infer ouster and adverse possession. Thus in *Gill & Simpson v. Fauntleroy's Heirs*, 8 B. Mon. 177, it was held that open and exclusive possession, under a deed of record, made by one cotenant and purporting to convey the entire fee in full, was sufficient to prove an ouster of the other cotenant; this is in accord with the opinion of O'NEALL, J., in *Gray v. Bates*, 3 Strob. 498: "It by no means follows that a purchaser from one of the cotenants of a part of the tract, without reference to the title of the other cotenants, would necessarily become tenant in common, so as to prevent him from perfecting a title under our Act of limitation. . . . The deed, contract, or plat under which possession is acquired constitutes color of title and defines or shows the extent of the occupant's claim;" and see *Heirs of Marr v. Gilliam*, 1 Cold. 488; *Hilton v. Duncan*, Id. 313, in both of which cases possession had been held for twenty years, and it was held that such possession would justify the jury in finding an adverse possession. In the case of *Hilton v. Duncan* the language of the court was that the jury might find "ouster and a release." In North Carolina, while it is held that no period less than twenty years' mere peaceable possession can give rise to a presumption of ouster, *Den ex d. Cloud v. Webb*, 4 Dev. L. 290; *Day v. Howard*, 73 N. C. 1; *Caldwell v. Neely*, 81 N. C. 114; *Covington v. Stewart*, 77 Id. 148; *Neely v. Neely*, 79 Id. 478, and that this rule is not altered where the defendant has entered under a deed from a tenant in common purporting to convey the whole tract, *Caldwell v. Neely*, *supra*, yet where a sole possession has continued for twenty years, and no adverse claim has been made in that time, there will be a legal presumption of the facts necessary to uphold the inference of an exclusive possession, adverse in its origin, and the entry of the cotenant not in possession will be tolled, *Den ex d. Black v. Lindsay*, Busb. 467.

In South Carolina, the same period—*i. e.*, twenty years—seems to be fixed as the minimum of time after which presumption of adverse possession will arise, *Gray v. Givens*, 2 Hill, Ch. 511; S. C., Riley, 41. The case of *Elliott v. Morris*, Harp. Eq. 281, is apparently *contra*. In it Chancellor DESAUSURE held that a presumption against the right of a cotenant had arisen after twelve years' exclusive possession by the other cotenant, with probable knowledge of the plaintiff, and the learned Chancellor's decision was affirmed on appeal, THOMPSON, Ch., however, dissenting, saying: "It will be observed that the title of the parties to the land never accrued until the year 1796, and the action was commenced in 1808, a period of twelve years, which has never been considered long enough to raise a presumption against a right." The doctrine of this case, however, which was decided in 1824, was modified by the case of *Gray v. Givens*, which

was decided in 1837, in that case HARPER, Ch., said, in delivering judgment: "It may be that if this case were before a jury it might be within their discretion to find an ouster. But I cannot venture to exercise an arbitrary discretion. If I could I should incline to exercise it in favor of the defendant. I must adopt some rule, and what shall it be—twelve, sixteen, or eighteen years? I can think of no other than that bar which is made to quiet almost every other claim and give efficacy to long possession—the lapse of twenty years." This was affirmed by the Court of Appeals, in whose opinion Chancellor DESAUSSURE concurred, and in which it was said: "There is no difference of opinion as to the length of time which is necessary to raise the presumption of an ouster by one tenant in common of his joint tenant."

Possession may Lose its Adverse Character.

A possession may lose its adverse character by the acts of the tenant, thus where, during the pendency of an ejectment suit, the defendant, who claimed adversely, bought a fractional interest in the land held by him, it was considered that he had recognized the common character of his tenancy, *Carpentier v. Small*, 35 Cal. 346.

Statute of Limitations where Two are in Possession and One Claims the Whole.

So far, we have considered the question of the statute as arising between tenants in common, one of whom claims a part and is out of possession, the statute has, however, been applied where there has been a common possession and one of the tenants has sought to recover the whole, under such circumstance the statute has been very properly held an absolute bar to a recovery, *Dumont v. Dufore*, 27 Ind. 263. While no distinction between the two cases is adverted to in the opinion in the decision cited, yet that there is a substantial and marked difference is readily apparent; in the first case, the person seeking to avoid the bar of the statute, sets up the peculiar relation which interferes with its efficacy; in the second he denies that such relation has existed.

Dower in Estate in Common.

The widow of a tenant in common is entitled to dower in her husband's share, see Vol. I. p. 309; but it seems she will not be entitled to possession of the whole tract until it is assigned to her, *Collins v. Warren*, 29 Mo. 236; for the effect of a partition on the widow's dower, see Vol. I. p. 345.

Destruction of Tenancy in Common.

Tenancy in common can be destroyed in two ways only: (1) by the union of all the interests in one of the tenants in common; (2) by partition.

Absorption of all the Shares by One Tenant.

As to the first method it is to be remarked, that while one tenant in common can convey his share to another, there can be no valid parol sale of land as between tenants in common, for there can be no such delivery of possession or part performance as will take the case out of the Statute of Frauds, *Spencer & Newbold's Appeal*, 80 Pa. St. 317; *Workman v. Guthrie*, 29 Id. 495; *Chadwick v. Felt*, 11 Casey, 305; *Hill v. Meyers*, 43 Pa. St. 170; *McCormick's App.*, 57 Id. 54; and, also, that, on account of the distinctness of their titles, tenants in common, like coparceners and unlike joint tenants, can pass their interests to each other by way of release, 4 *Cruise Dig.*, Tit. 32, Ch. 6, § 25; *Rector v. Waugh*, 17 Mo. 13.

Partition.

As to the second method of terminating a tenancy in common—partition—it is to be remarked that originally at the common law all partitions by tenants in common were voluntary, we find in Littleton, sect. 318: "Tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law, but if they make partition between themselves by their agreement and consent, such partition is good enough," and see *Jackson ex d. Hunt v. Luquere*, 5 Cow. 221; and such was formerly held to be the law in Kentucky, *Coleman v. Hutchenson*, 3 Bibb, 209. The law in this respect was altered by the Statute 31 and 32 Hen. VIII., 8 and 9 Wm. & M., c. 31, and 3 and 4 Anne, c. 18, sec. 2, and a compulsory partition provided for amongst tenants in common. In all of the United States statutory methods of partition are now provided which are applicable to estates held in common. The enactment of a statute of partition does not, however, destroy the power of tenants to make voluntary partition, and it is not our intention in this note to treat of the practice under the various statutes, but merely to observe what has been held to be or not to be a good partition independently of the statutes. And, first, a partition cannot be well made by words merely, *Wood v. Griffin*, 46 N. H. 230; *McPherson v. Seguine*, 3 Dev. L. 153; *Snively v. Luce*, 1 Watts, 69; *Porter v. Perkins*, 5 Mass. 232; *Porter v. Hill*, 9 Id. 34; *Gratz v. Gratz*, 4 Rawle, 411; *Gardiner Manufacturing Co. v. Heald*, 5 Me. 384; and see *Anders v. Anders*, 2 Dev. L. . . .

529; but at common law partition might well have been effected by parol, if livery of seizin were made, *Wood v. Fleet*, 36 N. Y. 499. It is true Littleton says: "And note partition by agreement between parceners may be made by law between them, as well by parol without deed as by deed," sec. 250; but, without adverting to the fact that parceners only are expressly mentioned, it is to be observed that Coke restricts the force of the expression, if it be urged as applying to tenants in common, to cases in which the partition was executed by livery, Co. Litt. 169 a.

A parol partition, accompanied by acts to which the modern law may give the effect of a livery, may be good; thus in *Rider v. Maul*, 46 Pa. St. 376, R. and J. bought land together; at their request a line of division was run through the land; J. began work on the land lying to the east of the line, R. on that lying to the west; both afterwards left, and about a year subsequently R. returned and re-entered on his side. It was held that there was evidence of a partition. In *Ebert v. Wood*, 1 Binn. 216, it appeared that Wood and Ebert held certain land by undivided moieties; that they agreed to make partition, and, with the view of carrying out their agreement, went upon the land with a surveyor employed by them, and with his assistance ran and distinctly marked a line of partition, thus dividing the land into two parts, allotting one to each tenant; and that afterwards each took possession of the part allotted to him and held the same down to the time of suit brought. It was argued that such partition could not be good on account of the Statute of Frauds, but the court held the partition well made and binding. But to render a partition by an act *in pais* good, it must appear that the act was done in accordance with an agreement that it should have the effect of dividing the property and of vesting the portions into which it was divided in severalty. Thus in *Haughabaugh v. Honald*, 1 Treadw. 90, a testator's land was vested in two sisters, Mrs. H. and Mrs. S., who divided their land by a fence; it was held that this was too slight an act, in the absence of evidence of an agreement, to show that a partition had been made, BREVARD, J., saying: "There was no evidence of an agreement to divide. The joint tenants were both married women and would not be bound by any agreement made by their husbands, unless their assent was obtained agreeably to law. The evidence of a separate possession was too loose to afford any solid ground for presuming a partition." This was a case of joint tenancy, and consequently is of great weight, in view of the policy of the law to defeat the *jus accrescendi* where it may be done.

A parol partition, followed by possession in accordance with the terms thereof, is binding, *Jackson ex d. Duncan v. Hardee*, 4 Johns. 202; *Jackson ex d. Vanbeuren v. Vosburgh*, 9 Id. 270; *Jackson ex d. Bowman v.*

Christman, 4 Wend. 277; *Jackson ex d. Garnsey v. Livingston*, 7 Id. 137, affirmed *Corbin v. Jackson*, 14 Id. 619; *Byerss v. Wheeler*, 25 Id. 434; *Baker v. Lorillard*, 4 Comst. 257; *Wood v. Fleet*, 36 N. Y. 499; *Pomeroy v. Taylor*, Brayt. 174; but to be good against third persons the possession must be open and visible, so as to give notice, *Manly v. Pettiee*, 38 Ill. 128; and, if not followed by possession, a division by parol or by acts *in pais* will be void under the Statute of Frauds; thus in *Snively v. Luce*, 1 Watts, 69, the tenants in common appointed, by parol, agents to make a division of the land held in common; the agents went upon the ground, made a division, and executed a writing under seal, setting out the division; but no possession was taken in accordance with the division: the court held that the partition was void; and see *Gratz v. Gratz*, 4 Rawle, 411.

In New Hampshire a partition by parol has been held invalid, although the division line between the tenants in common was marked and monuments were set up, and the division was followed by occupation, *Ballou v. Hale*, 47 N. H. 347.

Inference of Partition from Long Possession in a Particular Way.

A partition has been inferred from a long possession in a particular way, *Russell's Heirs v. Mark's Heirs*, 3 Metc. (Ky.) 37; *Markoe v. Wakeman*, 107 Ill. 251 (in which case the court assumed the existence of a deed of partition from the long possession); but mere payment of taxes on a special part of the land will not sustain the inference; and it is held, and as it seems to us very properly, that there must be some evidence of a division in fact, either by visible lines or monuments, or possession under claim of several rights of distinct and clearly defined parcels, for no length of time of acquiescence in an agreement to hold common land in a certain manner will destroy the right of common possession, unless there has been a division of the land, *Booth v. Adams*, 11 Verm. 156; for tenants in common may well by agreement occupy different parts of the land without affecting their ultimate rights as cotenants, *Johnson v. Goodwin*, 27 Verm. 288; and in *Lloyd v. Gordon*, 2 Har. & M'H. 254, it is said that from no length of time will a partition be presumed, in the absence of an exclusive and adverse possession.

Partition by Deed.

A partition may well be made by deed other than by way of release, but a mere *agreement* by deed to convey will not sever a tenancy in common, *Burton v. Morris*, 3 Harring. 269.

Warranty in Partition.

In some cases it has been held that no warranty is implied in a voluntary partition between tenants in common. This position is stated by REDFIELD, Ch., in *Beardsley v. Knight*, 10 Verm. 185 (which was a case of partition by deeds of quitclaim), as follows: "A tenancy in common may exist of unequal interest, and is always of different titles. Before the division one tenant has no interest in the *title* of the other. It is supposed the title of both is perfect. If the title of either is defective, he is not entitled to claim partition; if he sue for it, either under the statute or in chancery, he will not be entitled to it until his title is fully established. But if the cotenant is willing to waive all disputes of title and recognize him as cotenant and proceed to a division, which is effected by each conveying a portion of the land to the other, we know of no reason why this should be treated differently from the other cases of conveyances between parties differently situated." And this would seem to be the true statement of the law where the tenancy in common severed arose as it ordinarily did at common law, by purchase, and where the old common law rule that tenants in common are not compellable to make partition exists, see *Patterson v. Lanning*, 10 Watts, 135; *Rector v. Waugh*, 17 Mo. 13; but in a case of tenancy in common arising by descent, which in this respect rather resembles coparcenary than the old tenancy in common, a different rule is applicable, and there a warranty will be implied as between parceners, *Patterson v. Lanning*, *supra*; *Huntley v. Cline*, 93 N. C. 458; and, indeed, it would seem to be a correct statement of the law generally held, at the present day to say that, wherever partition is compellable by law, and voluntary partition is made, a warranty will be implied, the reason, for the distinction between the modern and the ancient rule, being that at the old law no partition could be compelled, and therefore the position of the tenants in making partition was not different from that of ordinary vendors and vendees; but under the modern law a compulsory partition can be had, and therefore as the tenants only do what in contemplation of law they are compellable to do, the law, which has imposed on them an obligation which did not formerly exist, owes them an additional protection, *Picot v. Page*, 26 Mo. 398; and see *Nixon v. Lindsay*, 2 Jones Eq. 230; *Rogers v. Turley*, 4 Bibb, 353; *Morris v. Harris*, 9 Gill, 19; *Huntley v. Cline*, 93 N. C. 458.

Partition by Tenant for Life or in Remainder.

Partition can be made by tenants in common for life, but their action cannot affect the remainder-men, *Jackson ex d. Hunt v. Luquere*, 5 Cow.

221, and the fact that the life tenants have a contingent remainder in the share of any one of their number who may die without issue will not enable them to make partition of anything but their present interest, *Reeves v. Reeves*, 6 N. J. Eq. 156; and tenants in common in remainder may have partition, although a life estate be in existence; and a sale of the fee, subject to such life estate, may be had if the premises cannot be well divided, *Hilliard v. Scoville*, 52 Ill. 449; S. C., 48 Id. 453.

Adverse Possession defeats Claim for Partition.

Adverse possession will defeat a claim for partition, Co. Lit. 167; *Brock v. Eastman*, 28 Vt. 658; and see *Leeper v. Naegle*, 94 N. C. 338, and it matters not for how short a time the adverse possession has been maintained, as said by KENNEDY, J., twenty-one days is as good for this purpose as twenty-one years, and if this adverse possession is established the tenants do not hold together, and the plaintiff must try his title in ejectment before he is in a position to ask for a division of the land, *Law v. Patterson*, 1 W. & S. 184; *M'Masters v. Carothers*, 1 Pa. St. 324; *Longwell v. Bentley*, 3 Grant, 177; but the adverse possession which will defeat a partition must be an actual one, and not one arising out of an ouster so considered at the election of one who desires to regard himself as disseized for the sake of a remedy, *Fisher v. Dewerson*, 3 Metc. 544.

Executor who is also Tenant in Common may have Partition.

The appointment of one tenant in common as executor to the other will not so far merge the titles of the cotenants as to defeat the right which the executor has, as tenant of his own share, to partition, *Hunter v. Stoneburner*, 92 Ill. 75.

Right to Partition Superior to Lien or Share of Tenant.

The existence of a lien upon the share of a tenant in common property will not prevent partition, for the right thereto is superior to such a lien, *Wright v. Vicker's Adm'r*, 81 Pa. St. 122; *McCandless's Appeal*, 10 W. N. C. 563; S. C., 98 Pa. St. 489; *Reed v. Fidelity Insurance, etc., Co.*, 113 Pa. St. 574, therefore, a mortgagee of an undivided interest need not be made a party to proceedings in partition, *Stewart v. Allegheny National Bank*, 101 Pa. St. 342; *Bavington v. Clarke*, 2 P. & W. 115; *Long's Appeal*, 77 Pa. St. 151, but *semble contra* in Massachusetts, *Colton v. Smith*, 11 Pick. 311; and when the partition proceedings result

in a sale, the lien of the mortgage will be discharged and the mortgagee will be compelled to look for satisfaction to the proceeds, but, in equity, where two cotenants have executed a mortgage for a joint debt and are equally liable therefor, on partition being made, the share of each is primarily chargeable with one-half of the debt and costs, *Rathbone v. Clark*, 9 Paige, 648.

Account in Partition.

An account is frequently taken when a partition is made, but it is not a necessary accompaniment thereof; the principles governing such an account have been sufficiently indicated.

Effect of Partition on Easement.

Where an easement exists in favor of the land held in common, and a partition is made, nothing being said about the easement, it will be extinguished, *Livingston v. Ketcham*, 1 Barb. 592 (a case of common of estovers).

No new Estate created by Partition.

A partition creates no new estate, and the land divided will descend subject to the same rules of inheritance that controlled it before the division, and unaffected thereby except as to the *quantum* descending; thus, where one M. died, leaving a sister C. and a grand-nephew W., by another line, C. and W. made an amicable partition, W. died leaving a mother H. and brothers and sisters of the half-blood, but not of the blood of M., it was held that W. and C. were tenants in common, and W.'s estate went to H. to the exclusion of W.'s relatives of the half-blood, *Conkling v. Brown*, 57 Barb. 265; S. C., 8 Abb. Pr., N. S., 345.

Where the land is subject to a condition a partition will not destroy the condition, *Sawyer v. Sawyer*, 61 N. H.; *Whitney v. Kendall*, 63 Id. 200. In the last-cited case the plaintiff and the defendant were tenants in common; the defendant made a deed for an undivided part of the premises to the plaintiff on condition that during the defendant's lifetime the plaintiff should not dispose of the land or permit the same to be occupied by any person other than herself without the authorization of the defendant, given by deed; the plaintiff sought a partition which was opposed by the defendant; the court held that partition should be made, and that the condition would not be affected thereby.

Estate by Entireties.

THORNTON *v.* THORNTON.

Court of Appeals of Virginia, February, 1825.

[Reported in 3 Randolph, 179.]

An estate given to husband and wife is not a joint tenancy, and therefore is not affected by our Act of Assembly, concerning joint rights and obligations. In such an estate, each party takes the entirety, and the survivor takes the whole, not by *survivorship*, but by virtue of the original conveyance.

THIS was an appeal from the Fredericksburg Chancery Court, where Francis and Ann F. Thornton, infants, filed a bill against Francis Thornton, by their next friend. The plaintiffs were children of the said Francis Thornton, the defendant, and Jane Thornton, his wife, who was then dead. The subject of the suit was this: John A. Thornton died, leaving a will, in which there is the following clause: "Item, I give, devise, and bequeath to my brother-in-law, Francis, and my sister, Jane Thornton, all the rest and residue of my estate, real and personal, to them and their heirs forever, upon the terms and conditions following." These conditions are not material to the present report. Jane Thornton died in the lifetime of her husband Francis. The complainants, as children of the said Jane, claimed the moiety of the said estate, which, they said, belonged to their mother; contending that their parents were joint devisees of the estate devised to them by John A. Thornton, and that by the law of Virginia, the interest of the said Jane, who died first, did not accrue to her husband, as the survivor, but descended to the complainants.

Francis Thornton answered, asserting his right to the absolute estate, in fee simple, in the lands devised by John A. Thornton to him and his wife.

The Chancellor decreed in favor of the defendant, and the complainants appealed to this Court.

Leigh, for the appellants.

The question is, whether if lands be conveyed to husband and wife, and their heirs, during their coverture, the husband and wife be joint

tenants thereof, within the meaning of the statute of Virginia concerning partitions, joint rights, and obligations? 1 Rev. Code, 98.

It is certain the husband and wife, in such case, are not, as other joint tenants are, seized *per my et per tout*. They take *per tout*, but not *per my*. There can be no moieties between them. They are both seized of the entirety; so that the alienation of either without the consent of the other, and even a forfeiture by one, will in nowise affect the right of the other. The survivor takes the whole. Co. Litt. § 291, 187 b; Id. 133, a, *Margery Moses's Case*; *Back v. Andrew*, 2 Vern. 120; *Green v. King*, 2 W. Black. 1211; *Glaister v. Hewer*, 8 Ves. Jr. 199. Hence it would seem, that though husband and wife, in such case, be not joint tenants, subject to all the incidents which attach to an ordinary estate in joint tenancy, their estate is more emphatically a *joint estate* than any other joint tenancy whatever; since it can, by no possibility, be severed.

Are they *joint tenants* within the meaning of our statute? 2 Blackst. Com. 182, says: "They are neither *properly* joint tenants nor tenants in common; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety *per tout et non per my*." He does not say they are not joint tenants in any sense; but only that they are not *properly* joint tenants; because, unlike ordinary joint tenants, they are seized *per tout*, but not *per my*. Their estate is more indefeasibly joint than any other joint tenancy.

On these authorities, it has been held by the Supreme Court of New York, in *Jackson v. Stephens*, 16 Johns. 110, and by Chancellor KENT, in *Rogers v. Benson*, 5 Johns. Ch. Ca. 437, that husband and wife, in such case, are not *joint tenants*. On the other hand, COKE says expressly, that they are *joint tenants*, notwithstanding the diversity between them and ordinary *joint tenants*, in respect to the inseparability of their rights. Co. Litt. 299, b. And the Supreme Court of Massachusetts admits they are joint tenants, though perfectly aware of the distinction. *Shaw v. Hearsey*, 5 Mass. Rep. 521.

As to the construction of our statute

There is a statute in New York, concerning joint tenancy, under which it has been held, that husband and wife, in such case, are not joint tenants within its meaning. *Jackson v. Stephens*, 16 Johns. 110; *Rogers v. Benson*, 5 Johns. Ch. Cas. 437. There is a similar statute in Massachusetts, under which there has been a similar determination.

Shaw v. Hearsey, 5 Mass. Rep. 521. But these statutes are not like ours. They are by no means so strong or comprehensive. 1 Rev. Code, Ch. 198, § 2.

By our statute, the *jus accrescendi* between *joint tenants* is abolished, "whether they be such as might be compelled to make partition or not." This is applicable to a joint estate purchased to husband and wife, during coverture. All other joint estates are capable of severance, either by writ of *partitione facienda*, or by alienation. The expression "of whatever kind the *estates* or thing holden may be," extends to all sorts of joint estates.

Stanard, for the appellee.

[The Court having entered fully into the argument on this side, it is deemed unnecessary to give the argument at the bar.]

February 19. The Judges delivered their opinions.

CARR, J.—The controversy in this case depends on that part of the will of John A. Thornton, by which he devises to his brother-in-law, Francis Thornton, and his sister Jane (they being man and wife), all the residue of his estate, real and personal, to them and their heirs forever, on certain conditions, which it is not material to state. The wife, Jane, has since died, leaving two infant children, who, by their next friend, have filed this bill against their father, claiming their mother's moiety of the land and personal estate. The only question raised in the argument was this: when real estate is given to husband and wife, and their heirs, are they joint tenants, and within the operation of our Act of Assembly, which abolishes the right of survivorship?

Joint tenants are said to be seized *per my et per tout*, by the *half* and by *all*; that is (as BLACKSTONE explains it), they each of them have the entire possession, as well of every *parcel* as of the *whole*. The most striking incident in joint estates is the right of survivorship; "the natural and regular consequence" (says BLACKSTONE) "of the union and entirety of their interest." Joint tenancy may be severed and destroyed by alienation, or any act which destroys either of its four constituent unities; and whenever, or by whatever means, the jointure ceases, or is severed, the *jus accrescendi*, at the same instant, ceases with it. But,

though the jointure might be destroyed by various acts, yet, at the common law, there was no mode by which a partition might be compelled, so that the joint tenants might hold, each his moiety in severalty. To remedy this inconvenience, the statutes of 31st and 32d Hen. VIII. gave the writ *de partitione facienda*, by which joint tenants and tenants in common might be *co-acted* and compelled (as the statute expresses it) to make partition. The first of these statutes applied to estates of inheritance only ; the second took in estates for life or years ; neither of them comprehended personal chattels. Now, although these laws use the broadest terms, “*all* joint tenants that be, or hereafter shall be, of estates of inheritance, etc., may be compelled to make partition, etc.”; yet it is most certain that they have never been supposed to reach the case of lands given in fee (or for any lesser estate) to husband and wife, for all the books, from the oldest I have been able to examine down to the present day, agree, *una voce*, in this : that husband and wife not only cannot compel each other to make partition, but that even if they concur in the wish, they have not the power, to sever the tenancy. It is a *sole*, and not a *joint* tenancy. They have no *moieties*. Each holds the *entirety*. They are *one* in law, and their estate *one* and *indivisible*. If the husband alien, if he suffer a recovery, if he be attainted, none of these will affect the right of the wife if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place, where, by the death of one joint tenant, the survivor receives an accession, something which he had not before, the right of the deceased. But husband and wife have the *whole*, from the moment of the conveyance to them ; and the death of either cannot give the survivor *more*.

To show that the language I hold is not too strong, I will quote two or three, out of the numerous cases, to be found on the subject. In Coke Littleton, 187 b, we have the following case : William Ocle and Joan, his wife, purchased lands to them two and their heirs. After, William was attainted of high treason for the murder of the King's father, Edward II., and was executed. Joan, his wife, survived him. Edward III. granted the lands to Stephen de Bitterly and his heirs. John Hawkins, the heir of Joan, in a petition to the king, discloseth this whole matter ; and upon a *scire facias* against the patentee, hath judgment to recover the lands, for the reason (says my Lord COKE) here yielded by our author. This reason was, that husband and wife are one in law, and there are no *moieties* between them. In the same page it is said : “If

an estate be made to a villein, and his wife being free, and to their heirs, albeit they have several capacities, viz., the villein to purchase for the benefit of his lord, and the wife for her own, yet if the lord of the villein enter, and the wife surviveth her husband, she shall enjoy the whole land, because there be no moieties between them.” In 3 Rep. 5, a case is cited from Moor, which I have examined. It is a very strong one. The husband levied a fine; but this was decided to have no effect on the wife’s interest. The reason given is, that there are no moieties between them, but both have the whole; and it is added, that during the wife’s life, the *jointure* can by *no possibility* be severed. Here it may be remarked, that in this case it is called a *jointure*, and in several others sometimes a *joint estate*, and sometimes they are called *joint tenants*. But I consider this a looseness of phrase merely. The estate being given to two, which in every other case would make a *joint tenancy*, it is thought that these words approach nearer to a description of it than any others that could be used without a good deal of circumlocution. In Glaister *v.* Hewer, 8 Ves. 195, the bankrupt had, many years before bankruptcy, but during coverture, bought land, and taken the deed to himself and wife, and their heirs. The Master of the Rolls says: “Unless the joining the wife was merely colorable and fraudulent, without intention of giving her any estate, it is not made to the only use of the bankrupt; and in a purchase jointly with his wife, he has no use which he might lawfully depart with, so as to bind her; for the same words in a conveyance to husband and wife, that would make a joint tenancy in others, gives the entirety to them; and the husband, as against her, cannot pass any right, title, or interest; but if she survives the whole must accrue to her. His conveyance is not good for a moiety.” In Doe *v.* Parratt, 5 T. Rep. 652, Lord KENYON says: “It seems to me, from the manner in which the case is drawn, that it was intended to be argued that the devise in the will to the nephew and his wife created a joint tenancy; but that question has been properly abandoned; for though a devise to A. and B., who are strangers to, and have no connection with each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy and passes a moiety; yet it has been settled for ages, that when the devise is to husband and wife they take by entireties and not by moieties, and the husband alone cannot by his own conveyance, without joining his wife, divest the estate of the wife.”

Thus stood the law, and thus it had been settled for centuries, when the

statutes of 31st and 32d Hen. VIII. were substantially copied into our Code. The was done at the revision of 1779, passed in 1785, and taking effect in 1787. 12 Hen. Stat. at Large, p. 349. It is impossible to suppose that the learned and able lawyers, who were the authors of that revision, were unacquainted with the state of the law on this subject. They could not but know that the case of husband and wife had never been considered, either within the letter, or the mischief, of these statutes. The first section of our law of "Partitions, Joint Rights, and Obligations," giving the writ of partition, etc., is, in substance, taken from those Acts. Within this first section, then, it cannot have been intended to include the case of husband and wife. And yet, if that case had been thought to require the remedy given to joint tenants and tenants in common, this was the place for it; and nothing would have been easier than to have said, that in all cases where husband and wife take an estate, which would have made them joint tenants, if unconnected with each other, they shall henceforth be held joint tenants and compellable to make partition. The absence of all provision on the subject furnishes strong ground to conclude that the case was not considered within the mischief of the statute. But let us see whether the second section includes it. It may not be amiss to remark, by the way, that the words which are thrown into a second section, in the subsequent revisions, formed a part of the first in the original act. After enacting that joint tenants and tenants in common may be compelled to make partition, the Act proceeds thus: "If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, courtesy or dower, or transmissible to executors or administrators, and be considered, to every other intent and purpose, in the same manner as if such deceased *joint tenants* had been tenants in common." Does this section comprehend the case of husband and wife? I answer no; first, because the law applies to none but *joint tenants*, which I have shown that husband and wife are not; secondly, it is said, "the parts of those who die first shall not accrue to the survivors;" showing that the law contemplated those only who had *parts* or *moieties*; and all the cases show, that between husband and wife there are no *parts* or *moieties*, nothing which the act of the one can take *from*, or his

death add to, the other. As to the words, "whether they be such as might have been compelled to make partition or not," I say they still apply to *joint tenants* only; "whether they be such (joint tenants) as might have been compelled," etc. And has not this clause, in its correct sense, sufficient matter to operate upon? Are there not many *joint tenants* not compellable to make partition? Neither the Statutes of Hen. VIII., nor our law, give the writ of partition in joint tenancies of personal chattels. Now we know there are many such. LITTLETON says, section 281: "If a horse, or any other chattel personal, be given to many, he which surviveth shall have the horse only." Here is a whole class of cases where partition could not be compelled, and from which, by the operation of this clause, the *jus accrescendi* is taken away. That the clause pointed to this class is most evident from the words "of whatever kind, the estate or thing holden, or possessed, be," and the further words, "or transmissible to executors or administrators." This satisfies the clause perfectly, without extending it to a case neither within its letter nor spirit. The words "of whatever kind the estate holden be," seem to have inclined our excellent commentator on BLACKSTONE to the opinion that this clause takes away survivorship between husband and wife. 2 Tuck. Black. 181. For the opinions of this gentleman I have the highest respect. But, it seems to me, that these words were, in nowise, intended to reach such a case. The word "kind" (of whatever kind the estate be), means, I think, to describe the *quantity*, not the *quality*, of the estate. The quality was already marked by calling them *joint tenants*. But, as there may be a joint estate in fee, for life, or years, and as it was the intention of the Act to abolish the right of survivorship in all joint estates, it uses the terms "of whatever kind the estate may be."

I have said nothing on the point in the cause, which was the ground of the Chancellor's decree, because it was wished at the bar, that the opinion of the court should be expressed as to the tenancy of husband and wife; and thinking that decisive to support the decree I have not examined the other ground.

I am for affirming the decree.

GREEN, J.—The authorities referred to in the argument show incontestably that a conveyance to husband and wife, during coverture, vested in each of them the same entire estate. Each was seized of the whole

of the land, and not of part ; as well as of the whole as in the case of joint tenants ; and upon the death of one the other continued to be seized of the whole, precisely as he or she held it in the lifetime of the deceased. The survivor claimed nothing by the *jus accrescendi*. His estate was not enlarged, or added to, in any respect, by reason of his survivorship, as in the case of proper joint tenants ; where the part belonging to the deceased accrued to the survivor. This resulted from the principle of law, that husband and wife were one ; and, upon the same principle, a conveyance to a husband and wife and another, jointly, vested in the husband and wife a moiety, and in the third person a moiety ; and they held by moieties as joint tenants. But, the husband and wife held their moiety, not as joint tenants, by moieties between them, but as one sole tenant, in whom the whole indivisible interest in that moiety vested. Nor could this interest be severed by any act of the husband or wife, or both of them. Such a conveyance to husband and wife had precisely the same effect in law as if the land had been given to them during the lives of both, and after the death of either, to the survivor alone.

The question is, whether our statute concerning Joint Rights and Obligations affects, in any way, such an estate as this. The words of the statute are : " If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or of whatever kind the estates or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, courtesy or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common." Upon this statute, I observe, that it was intended to apply only to cases in which partition might have been made in the lifetime of the deceased party, either by legal process or by consent of the tenants. This is the necessary construction of the words, "if partition be not made," then the "parts," etc., "shall not accrue," etc. In the case of a conveyance to husband and wife no partition could be made, either coercively or by their consent ; not because of their connection as husband and wife, but because neither party had a right to claim any part in severalty, both being entitled to all. Again, the statute declares that "the parts of those who die shall not accrue to the survivors." This provision can apply only to cases in which the

tenants were entitled in their lifetimes *severally* to *parts* of the subject. The husband and wife, in the case at bar, were not entitled to *parts* of the subject, but each was entitled to the *whole*; and the survivor claims the whole, not by receiving any addition or accession to his estate, or rights or interest, by the death of the other, but because he was entitled to the whole by the original conveyance. The statute intended to prevent the right which belonged to the deceased, and which might be disposed of in his lifetime, from accruing to the survivor, and to devolve that right upon the heir, devisee, executor or administrator of the deceased; not to give a new right to the representatives of the deceased, which he had not in his lifetime. In the case of husband and wife, neither could, in the lifetime of the other, dispose of any interest in the lands so held by them to the prejudice of the other surviving, as might be done in the case of proper joint tenants. If a husband were, in such case, to convey all his interest in the land to a purchaser, and die, leaving the wife surviving him, the statute does not protect the purchaser, and could it be said that a moiety should, under the statute, descend to his heir? Confining the statute to the case of proper joint tenants, there was no occasion to provide for the safety of a purchaser from either; since, at the common law, his title would be valid, and he would hold as a tenant in common with the other joint tenant. The construction insisted on by the appellees would have the effect of vesting in the husband and wife new rights to which they were not entitled by the effect of the conveyance under which they claim, and of taking away a vested right from the other. Such an effect ought not to be given to any statute, if it could, when it is susceptible of such a construction as will only tend to preserve existing rights by repealing a rule of law, which, if unrepealed, might give such existing rights, in one event, to another. The expression, "whether they be such as might be compelled to make partition or not," applies to cases in which, although joint tenants hold by parts, as, for instance, by moieties, they cannot, by legal process, be compelled to make partition; but may make partition by consent, or sever the joint tenancy by the act of one of them. As if a joint estate be given to a man and woman, who afterwards intermarry, they are joint tenants, and hold by moieties. Yet neither can compel the other to make partition; but either may convey his or her part, and thus sever the joint tenancy. And so in the case of a joint interest in personal property, there were no legal means to compel a partition.

It was to these cases that this expression applied. It appears by the provision that executors and administrators might succeed to the parts of the deceased, that personal property was in the contemplation of the Legislature.

For these reasons the decree should be affirmed.

Judges COALTER, CABELL, and the PRESIDENT, concurred, and the decree was affirmed.

Where a grant or devise is made to a husband and wife there arises a species of estate which is of a joint character, and which is sometimes called an estate by the entireties. Concerning the tenants of this estate BLACKSTONE says: "They are neither properly joint tenants nor tenants in common; for husband and wife being one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my,*" Blackst. Com. Lib. 2, p. 182.

Mr. Preston's definition of tenancy by entireties is when husband and wife take an estate to themselves jointly, by grant or devise or limitation of use, made to them during coverture, or by a grant to them *in fieri* at the time of the marriage, which is completed by livery of seizin or attornment during the coverture, 1 Prest. on Est. 131.

Distinction between Estate by Entireties and Estates in Joint Tenancy and in Common.

The estate by entireties differs from a tenancy in common in much the same respects as does an estate in joint tenancy; it also differs from an estate in joint tenancy, in that, while that estate is a unit made up of divisible parts, the estate by entireties is a unit of indivisible parts. In the first case there are several holders of different moieties or portions, on the death of any of whom a new estate arises to the survivor or survivors by virtue of the survivorship; in the latter, upon the death of either husband or wife, no new estate comes into being, but there is a mere change in the properties of the legal person holding the originally granted estate, *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397; *Thornton v. Thornton*, 3 Rand. 179.

Origin.

The estate had its origin in the legal unity of husband and wife, and the rule of law is that whenever a devise or conveyance is made to husband and wife they will take neither jointly nor as tenants in common, but by entireties, *Rogers v. Grider*, 1 Dana, 242; *Fairchild v. Chastelleux*, 1 Pa. St. 176; *Stuckey v. Keefe's Ex'rs*, 26 Pa. St. 397; *French v. Mehan*, 56 Id. 286; *Clark v. Thompson*, 12 Id. 274; *Thomas v. De Baum*, 14 N. J. Eq. 37; and many authorities are pretty generally agreed that, even where the devise or conveyance is in terms expressly to husband and wife as tenants in common the estate will be by entireties, for the theoretic unity overrules the intent, *Estate of Phœbe H. Mitchell*, 15 Phila. 597; *McCurdy v. Canning*, 64 Pa. St. 39, and the rule rests upon the incapacity of the wife and husband to hold by moieties, *Rogers v. Benson*, 5 Johns. Ch. 437; *Jackson ex d. Stevens v. Stevens*, 16 Johns. 115; *Sutliff v. Forgey*, 1 Cow. 95; *Barber v. Harris*, 15 Wend. 617; *Taul v. Campbell*, 7 Yerg. 319; *Den ex d. Hardenbergh v. Hardenbergh*, 10 N. J. Law, 43; *Martin v. Jackson*, 27 Pa. St. 504.

There is, however, a line of authority to the effect that husband and wife may take and hold as tenants in common where an estate in common has been bestowed by apt words. This line seems to have its foundation upon the theory of Mr. Preston, who says: "In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do," 1 Prest. on Estates, 132; and again: "And even a husband and wife may by express words (at least so the law is understood) be made tenants in common by a gift to them during coverture," 2 Prest. Abst. 41; and also again: "Also when a grant is made to a husband and his wife and a third person, as tenants in common, each of these three will have a distinct and separate interest in and tenancy of a third part." KENT follows Preston, without citing any other authority and without giving a reason for the position taken, 4 Kent's Com. 363; and Judge SHARSWOOD, in his note to 2 Blackst. Com. 182, which has been cited in support of Preston's position, merely says, without giving any opinion: "There are great opinions in favor of the position that husband and wife may by express words be made tenants in common by a gift to them during coverture." The preceding sentence of Judge SHARSWOOD's note—"there is nothing, therefore, in the relation of husband and wife which prevents them from being tenants in

common"—seems to refer rather to the case where the conveyance has been made to two who afterwards marry, and not to the case of a tenancy arising during coverture. The only authority given by Preston is the following passage from COKE: "If a man make a lease to A. and to baron and feme—viz., to A. for life, to the husband in tail, and to the wife for years—in this case it is said that each of them hath a third in respect to the severalty of their estates," Co. Lit. 187 b. The slender foundation upon which Preston's assertion rests was pointed out by HOFFMAN, A. V. C., in *Dias et al. v. Glover*, 1 Hoff. Ch. 71, in 1839; and the question was, in 1843, very fully considered by the District Court of Philadelphia and by the Supreme Court of Pennsylvania in *Johnson v. Hart*, 2 Clark, 104; 6 W. & S. 319. In that case a deed had been made to "Hannah Speakman and John Hart and Lydia his wife . . . as tenants in common and not as joint tenants." KENNEDY, J., in delivering the opinion of the Supreme Court, said, after quoting Preston and the passage in Coke cited by him: "Now, although it may well be in the case mentioned by Lord COKE, that the husband and wife would each take a third as a separate and distinct estate is given to each of them severally in express terms, so that if they take at all consistently with the terms of the grant it must be a several and not a joint interest; but in the case put by Mr. Preston, the same meaning does not necessarily apply; for to many purposes, if not generally, husband and wife are regarded as one person only in law; and as the case in its terms does not preclude this idea of unity they may be considered as taking a joint interest in an undivided moiety of the whole, and as holding the same as tenants in common with the third person who has and holds the other moiety as tenant in common. Hence, according to Littleton, sec. 291, if a joint estate be made of land to husband and wife and to a third person, the husband and wife have but a moiety in law and the third person the other moiety, because the husband and wife are but one person in law. BRACON saith *vir et uxor sunt quasi unica persona quia caro una et sanguis unas*, Co. Litt. 187 b. . . . And in a case before Lord Keeper NORTH (Skinner, 182), A. B. having three nieces, one of whom had a husband, bequeathed a legacy to the husband and wife and the other two equally; and held that the husband and wife took one-third only of the legacy, and that the remaining two nieces took each a third thereof, because, as the Lord Keeper said, the husband and wife took only as one person according to the rule of the common law. So in *Barber v. Harris* (15 Wend. 615), where by a deed of settlement the grant was to a husband and wife and to six of their children, naming them, and to such other, etc., to hold as tenants in common, it was ruled, that the husband and wife took only as

one person, notwithstanding the estate was granted to them to be held in common and not jointly."

In *Martha Simmons's Est.*, 4 Clark, 204, LEWIS, P. J., said: "As a general principle the husband and wife are essentially one individual. They cannot be tenants in common by reason of the union of interest and rights which the law looks upon with favor." It is also to be noted that the decision in the case of *Rogers v. Grider*, 1 Dana, 242, rested on the incapacity of the wife to be tenant in common with her husband.

On the other hand, notwithstanding the case of *Dias v. Glover*, 1 Hoff. Ch. 71, we have but a few years later a Judge of the same court, in which that case was decided, M'COUN, V.-C., holding that an estate in common could be made to husband and wife during coverture, saying: "It is laid down as a well-understood rule of law that a husband and wife may by express words be made tenants in common by a gift or conveyance to them during coverture," *Hicks v. Cochran*, 4 Edw. Ch. 107. This case, however, it may be noted, is not the decision of a court of last resort, and certainly seems to conflict with the current of New York authority; see cases cited *supra*, on page 144. In *MDermott v. French*, 15 N. J. Eq. 78, GREEN, Ch., in the course of his opinion, citing 4 Kent Com., 1 Prest. Est. 132, and Judge SHARSWOOD's note to 2 Bl. Com. 182, says: "So it seems that a husband and wife may by express words be made tenants in common by a gift to them during coverture. . . . The bill alleges that the husband and wife were seized as tenants in common by virtue of a conveyance made to them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common." In Maryland, in the case of *Fladung v. Rose*, 58 Md. 13, there is a dictum to the effect that there is nothing decisive against Preston's rule, but the decision in *Fladung v. Rose* did not rest upon the common law effect of a conveyance or gift to a husband and wife expressly as tenants in common, but upon the effect of the Maryland Married Woman's Act upon a deed to husband and wife as joint tenants, assuming the common law to be different from Mr. Preston's statement thereof; and see *Marburg v. Cole*, 49 Md. 402. The Supreme Court of Iowa has, however, adopted Preston's view in the case of *Hoffman v. Stigers*, 28 Iowa, 302, without, it is true, supporting it by any reasoning, but still, unequivocally, assuming its correctness as a basis of decision.

The above review of the authorities, it is thought, shows, at least, the preponderance in number to be upon the side of the rule as first stated, viz., that a gift to husband and wife can give rise to no other estate than one by the entireties; and upon the reason of the common law the question

can hardly seem doubtful; granted the legal unity of man and wife, how can a gift be made to them which they are to hold together and yet separately? And an examination of all the decisions and dicta in favor of the contrary theory will show that there has been simply an implicit following of the opinion of a great conveyancer without examination of the grounds upon which that opinion rested.

Conveyance to Husband and Wife and Another.

One effect of the unity of husband and wife is that in case of a gift to them and another, they will take together but one moiety of the estate granted, *Hart v. Johnson*, 6 W. & S. 319.

Character of Conveyance to Create Estate by Entireties.

The conveyance to husband and wife which will give rise to the estate by entireties must be a conveyance whose effect is and is intended to vest an estate in the wife. This is well illustrated by the case of *Taylor v. Birmingham*, 29 Pa. St. 306. In that case a testator devised to his two sons, Alexander and Wilson, a tract of land, to be equally divided by a line running north and south, the choice of lots being left to the sons themselves. The sons, after the death of their father, entered upon and farmed the land together, and purchased and added to the tract some adjoining ground. Subsequently they divided the land, and Alexander and wife conveyed to Wilson and wife the part allotted to Wilson, and Wilson and wife conveyed to Alexander and wife the part allotted to Alexander. It was held that while the deeds taken simply and by themselves would create estates by the entireties, yet the court would look at the substance of the transaction, which showed a mere partition; and hence the wives did not take estates by entireties with their husbands. In *Chandler v. Cheney*, 37 Ind. 391, it was argued that to constitute the estate by entireties there must be a deed or devise to the grantees or devisees *as man and wife*, and therefore a gift to A. and B., who were in fact man and wife, but who were not so described in the instrument, would not make an estate by entireties; but this view was not adopted by the court. In delivering the opinion, PERKINS, J., said: "If this position is correct it would result that an estate by entireties could be created between a man and woman who were not then husband and wife, if they were described in the deed as husband and wife. We are of opinion that when a deed is made to a man and woman it may be shown by proof that they were actually husband and wife; and, on the other hand, if a deed is made to persons who are described in the deed as husband and wife, that it may be proved that they were not such husband and wife."

Conveyance to Two who afterwards Marry, or to use of Man and future Wife.

A conveyance in common to two who afterwards become man and wife is not affected by the subsequent marriage and converted thereby into an estate by entireties, but the tenants will continue to hold by moieties, *Wood v. Warner*, 15 N. J. Eq. 81; and the conveyance of an estate to the use of a man and such wife as he may afterwards marry will be sustained by relation on marriage as a joint estate, *Blackst. Com. Lib.* 2, p. 182; but a conveyance directly to a man and such wife as he shall marry will vest the whole estate in the man, *Id.*, Archbold's Note.

Statute Abolishing Joint Tenancy, etc., not Applicable to Estate by Entireties.

In most of the States, where the question has arisen, it has been held that the statutes abolishing survivorship or joint tenancy, or providing that gifts to two or more, in the absence of a manifest contrary intent, shall be taken to confer an estate in common, do not affect estates by entireties, because, strictly speaking, they are not joint tenancies, nor, legally, is a gift to husband and wife a gift to two persons. It has been so held in Pennsylvania, *Diver v. Diver*, 56 Pa. St. 106; New Jersey, *Den ex d. Hardenbergh v. Hardenbergh*, 10 N. J. Law, 42; *Wood v. Warner*, 15 N. J. Eq. 81; *Thomas v. De Baum*, 14 Id. 37; New York, *Rogers v. Benson*, 5 Johns. Ch. 437; *Wright v. Saddler*, 20 N. Y. 320; Maryland, *Craft v. Wilcox*, 4 Gill, 504; Virginia, *Thornton v. Thornton*, 3 Rand. 179; Wisconsin, *Ketchum v. Walsworth*, 5 Wisc. 95; Mississippi, *Hemingway v. Scales*, 42 Miss. 10, and was formerly so held in Massachusetts under the older Acts, *Shaw v. Hearsey*, 5 Mass. 521; but the law in that State has in this respect been changed by a recent statute, Acts 1885, Ch. 237, § 1, p. 679. In Wisconsin the case of husband and wife is expressly excluded from the operation of the statute; and so in Indiana, *Bevins v. Cline's Adm'r*, 21 Ind. 37.

Aliter in Certain States.

On the other hand, the case of husband and wife has been expressly brought within the operation of the statutes in Rhode Island, Pub. Stat. Ch. 172, § 1, p. 441; Massachusetts, *ut supra*; Mississippi, Rev. Code (1880), Ch. 44, § 1197, p. 346; West Virginia, Ann'd Code (Warth, 1884), Ch. 71, § 18, p. 549; and Kentucky, the statute of which last-named State declares that there shall be no right of survivorship between hus-

band and wife unless said right is expressly provided for, but husband and wife shall hold as tenants in common, Gen. Laws (1881), Ch. 52, § 13, p. 531; and in Iowa the statutes, while silent as to husband and wife, have been held to include them within their purview, *Hoffman v. Stigers*, 28 Iowa, 302, in which case WRIGHT, J., in delivering the opinion of the court, said, after citing *Jackson ex d. Stevens*, 16 Johns. 110: "Our statute is, however, very differently worded. It is that a conveyance to two or more in their own right creates a tenancy in common unless the contrary is expressed. This language is affirmative, declaring what the conveyance does or shall create. That of New York is negative, and speaks of what it shall not create or pass. If in this State the wife is one of 'two or more persons,' the husband being the other, then the conveyance to these creates a tenancy in common, nothing to the contrary being expressed. They are not indivisible in the sense and meaning of the common law (upon this fiction the estate in entirety rests), we have already shown; and the correctness of the conclusion is well attested by the entire spirit of our legislation touching the relation, as well as by every-day observation, when directed to the actual affairs of life; and the same criticism applies to the case of *Ketchum v. Walsworth*, 5 Wisc. 95, which construes a statute, in principle, in all respects like that of New York above cited. The husband and wife at common law receiving such a conveyance were not, as we have seen, properly joint tenants, and yet they had a joint estate. The estate had the quality of survivorship, and yet differed from that of joint tenancy in the essential feature that neither could convey away his or her interest so as to affect this right of survivorship in the other. Notwithstanding this difference we express the conviction that where there is no estate of joint tenancy, with right of survivorship, a devise or conveyance to husband and wife will give them an estate in common and not in entirety; and hence, as in the absence of some instrument a state of case creating such joint estate the parties would, in this State, hold in common, it follows that an estate in entirety cannot and will not be otherwise created; and as by the common law it was competent to make the husband and wife tenants in common by proper words in the deed or devise, and as in the absence of language indicating this intention they would take in entirety, so with us it is competent to create in them an entire estate by proper words; but if this is not done they will take in common."

Estate by Entirety non-existent in Ohio.

In Ohio the same policy which has prevented the existence of joint tenancy (see *Lessee of Miles v. Fisher*, 10 Oh. 1, and *ante*, p. 17) has prevented the existence of the estate by entireties, this was held in *Sergeant et ux. v. Steinberger*, 2 Oh. 305, the court saying: "It is well settled that the joint tenancy of husband and wife varies in many principles from other joint tenancies. . . . But the right of survivorship was the same as in other cases of joint tenancy, and in the case of husband and wife is as much at variance with our laws and usages as in the common case." The matter was more fully considered in *Wilson v. Fleming*, 13 Oh. 68, and the decision in *Sergeant v. Steinberger* was adhered to, Wood, J., said, in delivering the opinion of the court: "It is said in this case by the defence that although husband and wife by reason of their unity cannot hold an estate as joint tenants, nevertheless, on the death of either, the other takes by survivorship the whole estate. Can this principle be maintained? The *jus accrescendi* prevails among joint tenants only, and when there is no such estate there is no such survivorship, that is survivorship for the exclusive benefit of the survivor; for, though partners may hold by survivorship, they hold as trustees for others as well as for themselves, and not as joint tenants at common law. Are husband and wife an exception to the general rule? It has been so decided in some of the States; but the reasoning by which it is sustained is too subtle and too much re-refined; for, while it is admitted that estates in joint tenancy are prohibited by statute, and that husband and wife by reason of their unity cannot hold in that character, they are treated as quasi joint tenants and the doctrine of survivorship applied. It would become necessary to give to the whole subject a more extended research and a more thorough investigation were it not for the decision of our own courts and a well-settled conviction that they are sound law, and therefore ought not to be disturbed."

Effect of Married Woman's Acts upon Estate by Entireties.

Another class of statutes whose effect upon the creation of the estate by entireties should be considered is the class known as the Married Woman's Acts. In Pennsylvania the Supreme Court, in *Stuckey v. Keefe's Ex'r*, 26 Pa. St. 397, expressly confined the force of its decision, as to the effect of the statutes abolishing survivorship and the capacity of husband and wife to take as tenants in common, to estates created by instruments executed prior to the passage of the Married Woman's Act of 1848; and in *Bates v. Seely*, 46 Pa. St. 248, the case arose upon a conveyance made

"to be held under the decision of the Supreme Court in the case of *Stuckey v. Keefe's Ex'r*;" and it was held that, notwithstanding the Act of 1848, the estate given would be by entireties, as before the Act. A later case has shown that the conveyancer in *Bates v. Seely* acted with an excess of caution. In *Diver v. Diver*, 56 Pa. St. 106, a deed was made in 1849, conveying certain land to John Diver and Margaret his wife. It was contended that this deed, by force of the Act of 1848, created an estate in common. The matter was considered by the court and was decided adversely to the contention, STRONG, J., saying: "But it is said the Act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the Act. To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the Legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property by removing it from under the dominion of the husband. To effectuate this object she was enabled to own, use, and enjoy the property, if hers before marriage, as fully after marriage as before. And the Act declared that if her property accrued to her after marriage, it should be owned, used and enjoyed by her, as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The Act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them and regulates the enjoyment; that is, the enjoyment of the estate after it has vested in the wife. And the mode of authorized enjoyment is significant. It is to be, as her separate property is enjoyed, as property settled to her separate use. That Act, therefore, no more destroys her union with her husband than does a settlement of property for her separate use. To a certain extent she is enabled, but no more than is necessary, to protect her property after it has been acquired. We have held that she can convey her lands only by joining in a deed with her husband, *Pettit v. Fretz*, 9 Casey, 118. This is a clear recapitulation of the existing unity of the two. It need not be repeated that no greater effect is to be given to the Act of 1848 than its language and spirit demand. It is a remedial statute, and we construe it so as to suppress the mischief against which it was aimed, but not as altering the common law any further than is necessary to remove that mischief. To hold it as operating upon the deed conveying

land to a wife, making such deed assure a different estate from what it would have assured without the Act, is to lose sight of the legislative purpose. Were we to do so, it would become, in many cases, a means of divesting her of her property, instead of an instrument of protection. In the present case, if it has converted the estate granted to Diver and his wife into a tenancy in common it has taken from her her ownership and enjoyment of the entirety during her husband's life and her right of survivorship to the whole. . . . We hold, then, that no such effect is to be given to the Act of 1848 or any of its cognate Acts." See, also, *Gillan's Ex'rs v. Dixon*, 65 Pa. St. 395.

In Maryland, the common law is held to have been so far altered by the statute that a joint tenancy may be created by a deed to husband and wife. In *Fladung v. Rose*, 58 Md. 13, a husband and wife, for the purpose of creating a joint tenancy, conveyed land to one Limburger, who immediately reconveyed to them as "joint tenants and not as tenants in common, the survivor of them and the heirs, personal representatives and assigns of such survivor." The court in deciding the case said: "Nor is it inconsistent with what was decided in *Marburg v. Cole*, to hold that the common law in this particular has been, to some extent at least, modified by our statutes. We have said in that case that these provisions of the code do not affect the nature of the estate which, according to the common law, husband and wife take by a grant to them jointly; but this must be confined, as it was intended to be, to cases where the terms of the grant are similar to those in the deed then under consideration, viz., to husband and wife jointly, or to them and their heirs and assigns in fee. In such cases we have said the common law rule prevails, and a tenancy by entireties is the result; but this was not placed on the ground of any existing incapacity of husband and wife to take in any other mode. When the terms of the instrument are such, or similar to those used in that deed, the presumption is that the parties intend to create this particular species of tenancy, and the common law remains in force so far as to require the estate to be limited accordingly. But where the intent is manifest and apt words are employed to create a tenancy in common or joint tenancy, we are of opinion that in this State husband and wife are now capable of taking and holding a tenancy in common or joint tenancy, according to the express terms of the grant, and if, at common law they were incapable of so taking and holding the effect of our statute law is to remove the incapacity."

In New York, it is held that the Married Woman's Acts do not alter the common law rule, and a deed or devise to a man and wife will still cause them to be seized by entireties, *per tout et non per my*, *Bertles v.*

Nunan, 92 N. Y. 152; *Zornlein v. Bram*, 100 Id. 12; and although the Act of 1880, ch. 472, permits husband and wife to make division between themselves of the land so held, yet it does not change the former law, and, when division has not been made, the title to the whole estate will still remain, on the death of either husband or wife, in the survivor. The capacity of husband and wife to hold as tenants in common is, however, recognized, see *Hilton v. Bender*, 69 N. Y. 75, Act 1880, ch. 472. In the case cited there was a devise to "Robert Hilton, Jr., son of my deceased brother Robert and Catharine his wife, and Richard, son of my brother Derrick, as tenants in common." CHURCH, C. J., in delivering the opinion of the court, said: "There is nothing in the language indicative of an intent to give Robert Hilton, Jr. and his wife a half interest and the plaintiff the other half. The devise to Catharine, the wife, is as specific as to either of the others. The devise is to Robert, Catharine and Richard, and to their heirs and assigns forever. It follows that Richard's share is only an undivided third instead of half, as claimed." This would seem in effect to disregard the common-law rule, by which a devise to A. and his wife and to B., as tenants in common, would unquestionably give B. one-half; but it is thought that such divergence is not the law in New York, see authorities *supra*; and it is, besides, to be remarked that the proportion to be taken by Richard was not the point of the case; it does not appear to have been argued; it is not alluded to in the opinion of the court below, 9 N. Y. S. C., and seems to have been thrown in by the Chief Justice because the case was to go back for a new trial, for other reasons. If the case is to be sustained it must be as so many cases upon wills are sustained—solely on the ground of intention; and here, it seems to us, the learned judge went astray; for as Richard and Robert were both representatives of brothers of the testator, it would seem, *prima facie*, that the testator would desire to place each stirps upon an equality with the other; and the expression "as tenants in common," following the name of the last devisee, is in precisely the same position in which, at common law, it would have been placed, were the desire to make husband and wife tenants by entireties of an undivided half and the devisee tenant of the other half.

In Mississippi, the common law with reference to the estate by entireties is not altered by the Married Woman's Act, and the law is still that the same deed which would create an estate in joint tenancy in other persons will make husband and wife tenants of the entireties, *McDuff v. Beauchamp*, 50 Miss. 531.

In Michigan, the common law doctrine is maintained, *Fisher v. Provin*, 25 Mich. 347; so in New Jersey, *Washburn et al. v. Burns et al.*, 34 N.

J. L. 18; Indiana, *Chandler v. Cheney*, 37 Ind. 391; Wisconsin, *Bennett et ux. v. Child*, 19 Wisc. 362; Arkansas, *Robinson v. Eagle*, 29 Ark. 202.

In California a husband and wife are given, by statute, capacity to hold together as tenants in common, Civil Code, § 5161, p. 594.

In Illinois, the common law is held to be altered, and a deed to a husband and wife will be interpreted as will a deed to other and distinct persons. In *Cooper v. Cooper*, 76 Ill. 57, there was a deed to a husband and wife, "to have and to hold . . . unto the said party of the second part, heirs and assigns forever." The court held that, since the Married Woman's Act, this did not make an estate by entireties but an estate in common, WALKER, C. J., saying: "No reason is perceived, nor is any suggested, why a married woman should not thus hold property acquired, in fee, and as a tenant in common with her husband, precisely as she might with another person. The husband, under the statute, has no more immediate interest in or control over her property than has any other person." Later in the opinion the learned Judge said: "We are aware that this construction is not in harmony with that given by the courts of some of the States of the Union in construing their statutes enabling married women to hold separate property. But it may be our statute is materially different from theirs; but if it is not, still the tenor of our legislation has been broader on the subject than the legislation in those States; and hence we, to effectuate the intention of our General Assembly, should be more liberal; otherwise the courts would rather hinder than carry out the intention of the law. The intention of a law may be, to some extent, ascertained by subsequent legislation on the same subject. If, then, we look at all of our legislation on this subject, we can entertain no doubt that the General Assembly intended to remove all the fetters that barred married women in acquiring and controlling property, and that this was removed with the others. Mrs. Cooper, having acquired the right to purchase and hold in common with her husband, took the property with the incidents of the estate."

Neither Tenant in an Estate by Entireties can Convey without the Other.

The connection of the two tenants by entireties is so complete that neither can convey the entire estate without the joinder of the other in the conveyance, Co. Litt. 187; *McCurdy v. Canning*, 64 Pa. St. 39; *Thomas v. DeBaum*, 14 N. J. Eq. 37; *Hemingway v. Scales*, 42 Miss. 1; *Ames v. Norman*, 4 Sneed, 683; *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Id. 424; though the husband may during the coverture mort-

gage or convey his own interest, *Doe v. Gardner*, Spencer, 556; *Doe ex d. Peyster v. Howland*, 8 Cow. 277; but such conveyance will not sever the estate or enable the grantee to hold after the husband's death should it occur before that of the wife, or even let the grantee into possession to the exclusion of or jointly with the wife, where the conveyance is without her consent; see *infra*.

Control by Husband during Coverture.

The husband during the coverture has the control of the estate and may mortgage the property, *Fairchild v. Chastelleux*, 1 Pa. St. 181; *Barber v. Harris*, 15 Wend. 618; *Jackson ex d. Corson v. Cairns*, 20 Johns, 301; *Jackson ex d. v. McConnell*, 19 Wend. 175; *McCurdy v. Canning*, 64 Pa. St. 39; he may lease or otherwise make a valid transfer of the possession during the coverture, *Bolles v. State Trust Co.*, 27 N. J. Eq. 308; and may maintain trespass alone for damage to the property, although he may join his wife, and this is thought by KENNEDY, J., to be the better, though not compulsory, practice, *Fairchild v. Chastelleux*, *supra*. From this control, it follows that at common law the land might have been extended for the husband's debt.

The position that the husband's control of the estate by entireties would permit him to mortgage the estate, and that, irrespective of legislation to the contrary effect, he has such an estate as would be liable for his debts, has not escaped attack. In *Chandler v. Cheney*, 37 Ind. 391, the Supreme Court of Indiana denied the law to be as stated above, and refused to sustain a mortgage made by the husband alone. BUSKIRK, J., in delivering the opinion, very carefully reviewed, and in some cases severely criticized, the authorities upon which the statement rests, and said: "If neither can alienate the estates or any part thereof, or sever the joint estate, we do not see how the husband can dispose of the estate during their joint lives, or how he can lease it or mortgage it, or how it can be seized and sold upon execution for his debts if the whole estate belongs to the wife as well as to the husband. All the authorities agree that there can be no partition of the estate, for the plain and manifest reason that neither has any separate interest. As between husband and wife there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as the husband. Then how can the husband possess any interest separate from his wife, or how can he alienate or incumber the estate when, all the authorities, agree that the wife can neither convey nor incumber such estate? We are of the opinion that, from the peculiar nature of the estate and from the legal relation of the parties, there must be unity of

estate, unity of possession, unity of control, and unity in conveying or incumbering it; and it necessarily and logically results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife. The estate is placed beyond the reach of creditors unless it can be successfully attacked and set aside for fraud." The learned court seems to have been misled by losing sight of the double character of the husband's right. Undoubtedly, in an estate by the entirety, the wife, as well as the husband, is seized of the whole of the estate. The wife's seizin is as extensive as that of the husband, but the wife's estate is as subject to the right of the husband in a wife's estate as though she held it in severalty; and it would be strange if the power which a husband had, over an estate in which his interest and right arose solely *jure maritagium* should be refused him, as to an estate in which he had an additional right; to do so would make his seizin act so as to deprive him of a control which he would have, had he in his own right no estate whatever. Of course he could not so act as to prejudice his wife's ulterior rights; but at common law, we are convinced, in spite of the learned opinion in *Chandler v. Cheney*, that the control over the wife's estate by the husband was the same where the estate was by entireties as where it was in severalty, and hence that the estate by the entireties could be extended to the husband's debts and so far rendered liable to them, or, if necessary, be subjected to sale on foreclosure of mortgage or otherwise, and that title obtained through such a sale would be good against the husband, and, during his lifetime, against the wife, although, if she should survive her husband the estate would be hers solely. This position is supported by the reasoning of the court in *Washburn et al. v. Burns et al.*, 34 N. J. Law, 18; and *Bennett et ux. v. Child et al.*, 19 Wisc. 362.

The protection of the married woman's estate by those provisions of the married woman's Acts which forbid the conveyance, incumbrance or transfer of a married woman's estate by her husband without her consent first obtained, has been held, and, we think on general principles should be always held, to extend to the estate by the entireties, and so to prevent the levy of execution upon the estate for the debt of the husband during the life of the wife. The matter was fully considered in *McCurdy v. Canning*, 64 Pa. St. 39; and in the opinion delivered in that case (which was adopted by the Supreme Court) THAYER, J., said: "The case, therefore, stands thus: Here is a married woman who is neither a joint tenant nor tenant in common with the husband, but who is seized of the whole estate and with him entitled to possession of the whole. If a purchaser of the husband's interest may be put into possession with her what follows? This: First, you have destroyed her estate and turned her entirety into a joint tenancy

or tenancy in common; second, you have deprived her altogether of the possession, because it is not in the nature of things that she can enjoy actual possession with a stranger as she did with her husband; third, you have taken away her property without her consent, and destroyed her rights which were protected by the Act of April 11, 1848. She was entitled to possession of the whole with her husband. You propose to give possession of the whole with a stranger, a possession which she cannot and which he probably would not enjoy. If it should be answered that the property may be rented and a moiety of the rents and profits may be paid to her, that is only to say you may deprive her of her estate and give her another of inferior value, a substitution which you have no right to propose. The words of the Act of 1848 are of so comprehensive a character, and its purpose to protect every possible interest of the wife is so plain, that we cannot by any possible construction consistent with the object of the Legislature and the language which they have used, except this interest from its protection. These considerations lead us to the conclusion that one who, without the consent of the wife, purchases the husband's interest in real estate, in which both husband and wife are seized of the entirety and to the possession of the whole, of which she is entitled equally with him, does not acquire during the wife's life any right to the possession either jointly with her or to her entire exclusion."

In Indiana the law was held to be the same in the case of *Chandler v. Cheney*, 37 Ind. 391, in which the court said: "We are of opinion that while an estate by entireties does not come within the strict letter of the statute, yet it comes within the spirit of it;" and see *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Id. 305.

In New York, however, it has been held that the estate by entireties is not within the protection of the Married Woman's Act so as to prevent the application of the husband's interest to his debts, *Farmers and Mechanics' National Bank v. Gregory*, 49 Barb. 155; and the fact that the purchase-money of the estate has proceeded from the wife was not allowed by VAN VORST, J., in *Ward v. Krum*, 54 How. Pr. 95, to alter the rule; and see *Baker v. Lamb*, 18 N. Y. S. C. 519.

In Mississippi, the court, in *McDuff v. Beauchamp*, 50 Miss. 531, sustained a mortgage of an estate by entireties, saying: "These statutes [*i. e.*, the Married Woman's Act] were not designed to embrace estates which the feme covert takes and holds jointly with her husband, but those which she takes and holds (to the extent defined), as if she had no husband. The marital rights remain as they were, at common law, unaffected by the

statutes framed for the protection of the separate property." It is to be noted, however, that in the case cited the wife had joined in the mortgage.

Effect of Statutes of Partition.

Statutes of partition do not apply to the estate of husband and wife, *Thornton v. Thornton*, 3 Rand. 179; *McCurdy v. Canning, supra*; but in New York express power is given to tenants by entireties to make partition between themselves, Act 1880, ch. 472, p. 676.

Merger.

**WILLIAM JAMES, APPELLANT, v. DAVENPORT MOREY,
IMPLEADED WITH CALEB JOHNSON, RESPONDENT.**

*Court for the Trial of Impeachments and the Correction of Errors of New York.
Albany, December, 1823.*

[Reported in 2 Cowen, 246.]

At law, where a greater estate and a less meet, and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or, in the law phrase, is said to be merged.

This rule, at law, is inflexible.

And where the equitable and legal estates unite in the same person, the equitable is merged in the legal estate;

But, in equity, the rule is not inflexible;

It depends on the expressed or implied intention of the person in whom the estates unite, whether the equitable estate shall merge, or still be kept in existence;

Or upon the circumstance that he is not capable of making an election, being an infant, a lunatic, etc.

In the latter case, the equitable estate shall still be kept on foot;

And so where it is for the interest of the person in whom these estates unite, the law will imply an intention to keep the equitable estate on foot.

Thus, where a mortgagee purchases or takes a release of the equity of redemption, the whole estate is vested in him, and the mortgage is extinguished;

And with it the mortgage debt;

Unless intention, incapacity to elect, or interest, etc., in the mortgagee, intervene to prevent the merger.

And where a mortgagee purchases, or takes a release of the equity of redemption in a part of the mortgaged premises, the mortgage is extinguished *pro tanto*;

And may be apportioned between the part, as to which it is extinguished, and the part in relation to which it exists.

Various acts, declarations and circumstances considered, which evince an intention to keep the legal and equitable estates distinct, or to unite them.

The recording an assignment of a mortgage is not necessary within any of the general registry Acts:

It is, therefore, no notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong;

Nor is it notice to a subsequent assignee of the mortgagee ;
Nor to a subsequent purchaser or mortgagee of the premises.

The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment ; but not subject to the latent equities of third persons, unless the assignee have notice of such equities.

Payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him ;

But it is not necessary to the protection of the assignee, that he should give notice of his assignment to a subsequent assignee, or purchaser from the mortgagee.

Where, on a judgment entered by confession on a bond and warrant of attorney, a specification of the consideration was not filed, pursuant to the statute of 1818 (*now repealed*), whether the judgment is fraudulent and void as against a subsequent creditor by mortgage ? Quere.

And, per SAVAGE, C. J., a mortgagee is not a purchaser within that act.
WOODWORTH, J., contra.

The meaning and extent of the term *purchase*, considered, at law and in equity.
Per WOODWORTH, J.

A mortgagee cannot hold the mortgage as security for any claim which he has against the mortgagor by bond or simple contract, etc., beyond the sum specifically secured by the mortgage.

Especially where an objection is interposed by a *bona fide* judgment creditor.
Yet a mortgage, to secure future advances, is valid ;

And it seems, that, as between mortgagor and mortgagee, a mortgage given to secure one debt, may become security for a debt subsequently contracted by the mortgagor to the mortgagee, where the former consents.

A *deed*, absolute on the face of it, but intended by the parties as a security merely for a debt, though registered as a deed, is valid and effectual between the parties, as a mortgage ; but it is liable to be defeated by a subsequent mortgage duly registered.

A mortgage, by way of an absolute deed, must be registered as a mortgage, in order to be effectual against subsequent *bona fide* purchasers or mortgagees.

The registering it as an absolute deed, is not sufficient for this purpose.

Where the equity of redemption is merged by being united with the legal estate in the hands of a mortgagee, etc., an assignment by the words *grant*, etc., may enure as a conveyance in fee, if not restrained by the *habendum*.
Per WOODWORTH, J.

English doctrine of tacking, and whether it extends to mortgagors and creditors, considered, per WOODWORTH, J.

Meaning of the word *estate*, in lands, etc. Per SUTHERLAND, J.

Can be no merger unless *estates* meet. Per Id.

The registering a deed of conveyance is not notice to a subsequent purchaser, except in cases where its registry is made necessary by statute ; e. g., registering a sheriff's deed is not notice. Per Id.

Whether one having a recorded mortgage, standing silently by, and seeing another bid off the mortgaged premises on a judgment younger than the mortgage, forfeits his claim under the mortgage in equity? Quere. Per SUTHERLAND, J. But, per SAVAGE, C. J., he does not; for the registry is notice to all the world.

One assigns as mortgagee: Whatever interest he afterwards acquires in the mortgaged premises enures to confirm the assignment. Per SUTHERLAND, J.

When an equitable estate is once merged by a union with the legal, it is gone forever, and cannot be revived. Per CRAMER, Senator.

An order on reversal, including,

Form of order of reference to a master, to ascertain and report balance due on mortgage, etc.—Order of sale of mortgaged premises.—How to dispose of proceeds—to deliver title deeds, etc.—to deliver possession to the purchaser.

Of two unregistered mortgages, the oldest takes preference. Per SAVAGE, Ch. Justice.

The second cannot take preference, unless registered; and not even then if the second mortgagee have notice of the first mortgage.

APPEAL from the Court of Chancery. The bill in the court below was filed by James against Johnson and Morey. Issue was joined, and proofs taken; upon which the cause was heard by the Chancellor, who decreed in favor of the defendants. From this decree James appealed.

The facts material to the various points raised by the counsel, and decided both by the court below and in this court are stated in the opinions of the Judges and of CRAMER, Senator.

The report of the same case, as adjudged in the court below, is in 6 John. Ch. Rep. 417. The title there is *James v. Johnson and Morey*.

The late Chancellor assigned his reasons for the decree in the court below, as in 6 John. Ch. Rep. 420—434.

J. V. Henry, for the appellant, opened the case very fully, and concluded by stating and commenting upon the following points:—

I. The appellant is the assignee of the mortgage of the 24th of June, 1817, from Caleb Johnson to James O. Wattles, in good faith and for valuable consideration, having acquired his security, not by any unfair *traffic*, but in the honest and ordinary course of mercantile transactions.

II. Notwithstanding the sheriff's sales to James O. Wattles and William H. Sabin, that mortgage was still a subsisting mortgage, and

the assignment thereof to the appellant, on the 9th of November, 1818, was a valid assignment.*

1. Because the sales made by the sheriff were, in construction of law (the mortgage being unpaid, and satisfaction not entered on the registry thereof) and in fact, subject to the mortgage.

2. Because there was not a union of the entire legal and equitable estates in either of the purchasers.

3. Because it was not the intention, at the time of the sheriff's sales, that there should be a merger, inasmuch as the whole estate mortgaged was inadequate to the payment of the mortgage debt, by about \$2372; and inasmuch as Wm. H. Sabin was suffered to purchase one-fourth of the estate, worth \$2000, for the nominal price of \$205.

4. Because it is the established doctrine of equity to extinguish, or preserve a charge, according to the actual, or presumed intention, and interests of the person in whom the estates are united, and never to hold a charge as merged, but where it is perfectly indifferent to such party whether the charge should or should not subsist.†

5. That under this doctrine, a merger ought not to be suffered, as satisfaction of the mortgage debt, from the inadequate value of the mortgaged premises, has not and cannot be set up; and yet, by the extinguishment of the mortgage, it is plain, that any action on the bond accompanying it, would be either lost altogether, or the measure of recovery upon it rendered uncertain and unascertainable.

6. That a merger would, besides its direct repugnancy to the assignment of the mortgage and the express covenant by Wattles, that \$12,000 were due thereon, be a fraud upon the appellant, by depriving him of the pledge, though he took the assignment, for a full and valuable consideration, without the pretence of knowledge of any facts to impair or invalidate it, and before the respondent, Davenport Mcrey, had acquired any interest whatever in the mortgaged premises.

7. That the conveyance from William H. Sabin, on the 26th of March, 1819, of the one-fourth of the premises bought by him at the sheriff's sale, to James O. Wattles can form no ground for decreeing a

* *Jackson v. Hull*, 10 John. 481.

† 1 Cruise Dig. Tit. 8, Ch. 2, § 32; *Powell v. Morgan*; 2 Vern. 90; *Awdley v. Awdley*, Id. 193; *Arg. Thomas v. Kemish*, Id. 348; *Lawrence v. Blatchford*, Id. 457; 15 Vin. Ab., Merger (A); 5 T. Raym. 37; *Arg. Phillips v. Phillips*, 1 P. Wms. 41; *Arg. 2 Fonbl. Eq. Ch. 6, § 8*; *Ld. Compton v. Oxenden*, 4 Br. Ch. Rep. 397; 2 Ves. Jun. 261, S. C.

merger; because that conveyance was subsequent to the assignment of the 9th of November, 1818,* which, not only James O. Wattles, but Morey, who came in afterwards under him, are estopped from gainsaying,† and from which estoppel there can be no relief in equity against a *bona fide* assignee for valuable consideration.

8. That the doctrine of the extinguishment of a mortgage by the purchase of a part of the premises by the mortgagee is utterly subversive of the rights and security of mortgagees, and if countenanced by any of the principles of the common law would be one of the strongest illustrations of the necessity and propriety of the rule in equity preventing such extinguishment.

9. That the decree, if there can be a merger *pro tanto*, is erroneous relative to Sabin's purchase, as, in him, there was no legal estate into which the equitable could sink; and the assignment having passed the mortgage, as to this portion, to the appellant, could not be defeated by the after conveyance of Sabin to Wattles. Therefore, the moneys to arise from the sale of that portion of the mortgaged premises, at least should have been decreed to the appellant.

III. That all the testimony relative to the parol declarations imputed to Wattles, at, or before and after the sheriff's sale on the 20th of April, 1818, about his title, or relative to the release of the equity of redemption from Caleb Johnson, can have no operation upon this case, such testimony being incompetent in itself, and especially in reference to the appellant's rights.‡

IV. That, even if the sheriff's sales and the conveyance from Sabin to Wattles should be deemed to have united the legal and equitable estates in him, yet, by his assignment to the appellant on the 9th of November, 1818, the premises described in the mortgage are expressly granted, bargained, and sold to the appellant, his heirs and assigns forever, and his title thereto became absolute by estoppel, against Wattles, on the 26th of May, 1819, when Sabin conveyed to him, and against Morey, who came in under Wattles, on the 14th June, 1819.

V. That the appellant was not bound to record the assignment from

* 1 Fonbl. Eq. B. 1, Ch. 4, § 25; *Earl of Pomfret v. Ld. Windsor*, 2 Ves. Sen. 486.

† Com. Dig., Estoppel, (B).

‡ *Jackson v. Sherman*, 6 John. Rep. 19; *The Same v. Vredenburgh*, 1 Id. 159; *Fox & Payn v. Reil & Reil*, 3 Id. 477, is, that if there be a subscribing witness, he should be produced, etc.

Wattles to him, or to give notice of that assignment, to any person but the mortgagor.

1. The principle that renders valid all dealings with the mortgagee, before notice of the assignment, drawn from *Williams v. Sorrell* (4 Ves. 389), respects dealings between the *mortgagor* and the *mortgagee* before notice of assignment to the former, and has and can have no relations to dealings between the *mortgagee* and *other persons*, to whom, from their being *necessarily unknown*, *notice would be impracticable*.

2. That, if the registering Act relative to the military bounty lands applied to the present case, the recording of the conveyance from Wattles to Morey, as an absolute deed, was fraudulent and void; and, it not having been registered as a mortgage, according to the Act concerning mortgages (1 R. L. 373, §§ 2 and 3, the provisions in which have been re-enacted and continued from the colonial statute, and have always been co-extensive with the State), could not defeat or prejudice the appellant's title as a *bona fide* purchaser or assignee: the provision being, "that no mortgage, nor any deed, conveyance, or writing in the nature of a mortgage, shall defeat or prejudice the title or interest of any *bona fide* purchaser of any lands, tenements, or hereditaments, unless the same shall have been duly registered as aforesaid," i. e., as a mortgage. Registering it as an absolute deed was a fraud, *Coterell v. Purchase*, Cas. Temp. Talb. 61; Bac. Tracts, 37.

3. That the Act, however, of the 17 sess. c. 1, 1 R. L. 209, relative to military titles, has been inadvertently applied to the present case. It extends solely to the lands granted as military bounty lands, of which the Onondaga reservation was not a part, and therefore did not fall within that Act: nor was the reservation included in any other Act for recording deeds, until the statute of the 23d of March, 1821, sess. 44, c. 136, was passed, which made it necessary to record deeds, that should be executed after the 1st of July following, in any wise affecting the right or title, in law or equity, to lands in the towns of Onondaga and Salina. The very foundation upon which the decree is made to rest, is subverted by this misapplication of the registering Act respecting military bounty lands.

VI. That the judgment of the appellant against Wattles, entered upon a bond and warrant of attorney, *executed at the same time with the assignment of the mortgage*, for which the latter was a collateral security, and docketed on the 12th day of November, 1818, is a valid and sub-

sisting judgment, and entitles the appellant to a priority out of any funds to arise from a sale of the mortgaged premises, as Morey had actual notice of that judgment before the conveyance to him by way of mortgage, and was not a *bona fide* purchaser of the premises, for valuable consideration, within the meaning of the statute passed 21st April, 1818, avoiding judgments as *fraudulent, as respects any other bona fide judgment creditor and bona fide purchaser for valuable consideration.**

VII. That the appellant's legal title cannot be postponed or defeated, even if the equity of the parties were equal, and most unquestionably cannot when the whole equity of the case is against the respondent.

1. Because the respondent, in his first answer, filed on the 24th of April, 1821, falsely set up his deed as an absolute purchase, and thereby kept its real character concealed until the appellant amended his bill, and the respondent was thereby obliged to discover that it was a mortgage to indemnify him as the indorser of Wattles upon a note for \$5000, at the Auburn Bank, and to save harmless the respondent and Thomas I. Gilbert, from their bond to Amos P. Granger, to indemnify him from the debts and claims against the late firm of Wattles & Granger; and besides, that Wattles had for the same purposes and at the same time, by an instrument in writing, under his hand, dated the 14th of June, 1819, assigned all his share of the partnership goods and effects in the firm of D. Morey & Co., and also all the personal property belonging to him and then in the use of D. Morey & Co., at their distillery, ashery, store and shop in Onondaga to the respondent.

2. Because the respondent, whatever may be believed about his ignorance of the assignment of the mortgage to the appellant, had, at the time of the transactions last mentioned, a perfect knowledge of the judgment in favor of the appellant against Wattles; and that it had been entered to secure the payment of merchandise to the amount of \$9331, sold by the appellant to John Meeker; and that \$8369.58 of Meeker's goods, besides a parcel amounting to \$1248.75, which Wattles had bought from William James & Co., were put into the store of D. Morey & Co., when that partnership was formed in November, 1818, as a portion of Wattles's stock.

3. Because there was a large surplus of the personal property which

* 1 R. L. 500, § 1; Id. 370, § 4, which treat case of purchaser and mortgagee as distinct; Bac. Ab., Execution, (I), shows the same distinction in British statutes; Sugden, L. V., Phila. ed. 498, same distinction.

passed under Wattles's assignment to the respondent, beyond what was necessary for the payment of the note at the Auburn Bank, the debts that were paid by the respondent against the firm of Wattles & Granger, and even the full estimated amount of those debts contained in exhibit E, produced by the respondent.

4. Because it would be most unjust against the appellant to change the security for a specific indemnity under the deed and assignment of the 14th June, 1819, into a security for any balance which may be found due from Wattles to the respondent upon account; especially, "with liberty to the master to assume the adjustment and settlement in the pleadings and proofs mentioned as have been made by Azariah Smith, if the same should appear to him to have been fairly made and assented to;" as there is no allegation by the respondent, nor any proof, that an agreement to that effect was ever made; as, if it had been made, it could not have been obligatory on the appellant; and as the principal part of the charges on the debtor side of that adjustment, after the 14th of June, or 21st of July, 1819, are for the assumption and payment of debts for Wattles, out of the indemnity and out of the partnership business.

5. Because the respondent, in December, 1819, and upon other occasions, in treaties for the sale of the mortgaged premises, expressly recognized the appellant's lien and right, and broke off his treaty for the purchase of the premises, in December, 1819, because Wattles could not obtain a release thereof from the appellant's judgment.

VIII. That, upon the admission of all the principles entering into the decree, there is error in not having directed the respondent, who has been in the actual possession of the mortgaged premises, to account for the rents and profits since the last charge of rent in the adjustment of Azariah Smith.

T. A. Emmet (same side), to show that the registry of the assignment to James, not being made necessary nor any specific operation assigned to it, by statute, could not operate as notice to Morey, and would, therefore, have been nugatory, referred to *Morecock v. Dickens and others*, Ambl. 678; *Bushell v. Bushell*, 1 Sch. & Lef. 103; *Latouche v. Ld. Dunsany*, Id. 157; *Underwood v. Ld. Courtown*, 2 Id. 64; and *Pentland v. Stokes*, 2 Ball & Beatty, 75.

As to the construction of the words *bona fide purchaser*, he cited

Dunham v. Dey, 15 John. 555, and he read that part of the opinion of Mr. Justice PLATT which relates to this point, Id. 568-9, and 570.

H. R. Storrs and *T. J. Oakley*, contra. We shall contend that the decree of the Chancellor in this case is correct, and ought to be affirmed for the following, among other reasons:—

I. That the judgment of the appellant against James O. Wattles was fraudulent and void by the Act, 41 sess., ch. 259, § 8, for the want of a legal specification, and cannot be set up to affect the rights of the respondent under the conveyance of Wattles to the respondent on the 14th June, 1819.*

1. The defendant is a “*bona fide purchaser for a valuable consideration*” within the true construction of the Act.†

2. The amended specification, filed the 21st of August, 1819, subsequent to the conveyance from Wattles to the respondent, cannot aid the judgment; and especially as the liabilities of the respondent for Wattles were assumed before the respondent had any actual notice of the existence of the judgment.

II. If the appellant relies on the judgment he has a clear remedy at law to enforce it, and the bill cannot be sustained for that purpose.‡

He has acquired no right under the judgment which a Court of Equity will sustain as a subject of jurisdiction between the parties.

III. The mortgage from Caleb Johnson to Wattles was merged and extinguished, by a deed to Wattles from Caleb Johnson, which is sufficiently proved to have been executed previous to the sheriff’s sales of April 20th, 1818.

IV. If such deed is not deemed to be proved, then the mortgage was extinguished by the sale of the sheriff and deed to Wattles, of the 20th of April, 1818, as to all that portion of the premises purchased by Wattles at said sales.§

1. A purchase, at sheriff’s sale, of the mortgaged premises by the mortgagee, vests the entire legal estate in the mortgagee.

2. By the purchase of Wattles, the entire legal and equitable estates were united in him.

* *Lawless v. Hackett*, 16 John. 149; *Brinkerhoff v. Marvin*, 5 John. Ch. Rep. 320.

† 2 Bl. Com. 241; *Chapman v. Emery*, Cowp. 278; 4 Cruise Dig., Tit. 32, Deed, Ch. 22, §§ 38, 49; 1 Eq. Cas. Ab. 353.

‡ 4 John. Ch. Rep. 680.

§ *Gardner v. Astor*, 3 John. Ch. Rep. 53; *Forbes v. Moffatt*, 18 Ves. 384.

3. The acts and declarations of Wattles, before and after the sale, manifestly prove that intention.

V. The mortgage, being thus merged, could not afterwards be set up as subsisting—and the subsequent assignment to the appellant passed no interest therein, the appellant, who claims under Wattles, being estopped in equity from setting up the mortgage.

VI. The appellant, having neglected to record or register the assignment of the mortgage from Wattles to him, and the respondent *having had no notice* of such assignment, before he took the conveyance of June 14, 1819, from Wattles, cannot now set up the mortgage (if subsisting) as to any part of the premises.

1. The appellant, having given no notice of the assignment, cannot more avail himself, or set up any other rights, as against the respondent, than Wattles himself could have done.

2. The appellant, by neglecting to record the assignment, and permitting Wattles to occupy the premises, claiming an absolute title therein, put it in the power of Wattles to impose on the respondent, or others, by inducing them to believe that the mortgage was extinguished, and that Wattles was the owner in fee of the premises.

3. The equity of the respondent is, at least, equal to that of the appellant, and the court will, therefore, not interfere but leave the appellant to enforce his rights (if any he has) at law.

4. The conveyance of the 14th of June, 1819, to the respondent, became absolute in December, 1819, by the agreement between Wattles and the respondent.

VII. If the conveyance to the respondent, of the 14th of June, 1819, is not considered as having become absolute, but as a mortgage, then it is to be preferred to any interest acquired by the appellant.

1. Because the assignment to the appellant was not registered or recorded, before the execution or recording of the conveyance of the 14th June, 1819, to the respondent, and the respondent had no notice of such assignment before the execution of such conveyance.*

2. Because it was not necessary that the second mortgage should have been registered or recorded, before notice of the assignment to the appellant, if taken without such notice.

VIII. The respondent, on the whole case, has a right to retain his prior lien on the premises as a security for the amount found due to

* *Williams v. Sorrell*, 4 Ves. Jun. 389; *Johnson v. Stagg*, 2 John. Rep. 524.

him from Wattles, in the settlement by Smith, being \$4282.80 with interest, and also for the sum of \$1598.26 and interest, being the amount of five items of account, not included in the said statement, viz:—

1. Cash paid on the bond to A. P. Granger, on account of the debts of W. & G.	\$1000 00
2. Moneys collected by W. of James Norris	551 13
3. A hat of Delamater	8 00
4. Lydia Babcock, acct. recd.	33 55
5. A. Lall's acct. recd.	5 58
	\$1598 26

Which sums are now proved in the evidence, and may be allowed on a reference.

They added, that any actual notice of James's judgment must be altogether unavailable; because it was fraudulent, and the same act which carried notice of the judgment conveyed the information that it was a nullity.

If, as contended, the assignment operated as a deed of conveyance, and thereby passed all Wattles's legal estate, why does the appellant come into a Court of Equity? His remedy was at law, and having the entire legal estate, an action of ejectment would have answered him every purpose. But the contrary is plain, both from the recital and the *habendum* in the assignment, which is confined to Wattles's interest as mortgagee.

The declarations of Wattles were offered in evidence as being those of a tenant in possession, to show the character in which he claimed. Declarations are always admissible, even at law, under such circumstances.

In relation to the third point they remarked, that the general rule, as deducible from all the cases, is, that where the legal and equitable estates unite, the latter is merged in the former.* This rule is invariable, and without exception at law, wherever a greater and less estate meet in the same person;† but it is admitted there are exceptions in equity. These are, first, where there is an intention to keep the estates separate, avowed at the time of their union; second, where the one in

* *Gardner v. Astor*, 3 John. Ch. Rep. 53.

† 2 Blackst. Com. 177, 178.

whom they unite is interested in keeping them separate. But where this is indifferent to the party, or where the intention to keep the estates distinct is unknown to third persons, who act on the faith of an extinction, there shall be a merger. These distinctions are fully supported by the cases on which the Chancellor* relies, of *Compton v. Oxenden*, 2 Ves. Jun. 261; *Thomas v. Kemish*, 2 Vern. 348; and *Forbes v. Moffatt*, 18 Ves. 384.†

When once the estate is merged it is gone forever; or, in the language of Blackstone,‡ it is “annihilated,” and “shall never exist any more.” It is enough for us to establish this union of estates; which is, *prima facie*, a merger in equity. If the opposite party mean to show it an exception, he must do so by establishing an intention in Wattles to keep up the separation. Something to this effect must be done at the moment of the union, not after. Any subsequent act, like the assignment to James, will avail nothing as evidence of the intention; for the merger being perfect, it cannot be done away. The remark in 2 Fonbl. B. 2, Ch. 6, § 8, note (a), that mergers are odious in equity, and never allowed except for special reasons, rests upon *Phillips v. Phillips*,§ where the language of the court was entirely gratuitous. “If a man,” says Fonblanque||, “has the same interest, and absolute dominion and property in the whole inheritance as he has in the term or power for raising money out of the inheritance, there it must merge.” This remark is directly applicable here, as is plain from the exception mentioned by the same author. In *Thomas v. Kemeys*,¶ cited by him, there was no union of the legal and equitable estates. There was a term outstanding in trustees; and so not merged in law, nor, consequently, in equity. In *Donnisthorpe v. Porter*,** the ground taken in *Thomas v. Kemeys* is rendered still narrower, it being determined that where a person has a right to a sum of money charged upon an estate, and secured by a term of years, and afterwards becomes entitled to the fee simple of the estate, a Court of Equity extinguishes the equitable lien, except in the case of creditors or of infancy. We also refer to Gilbert on Uses and Trusts, by Sugden, p. 28, n. (3), and the cases there cited. One of the authorities mentioned there is that of *Wade v.*

* 6 John. Ch. Rep. 423–4.

† And *vid. 2 Fonbl. B. 2, Ch. 6, § 8.*

‡ 2 Blackst. Com. 177.

§ 1 P. Wms. 41.

|| 2 Fonbl. B. 2, Ch. 6, § 8.

¶ 2 Vern. 348.

** 2 Eden’s Rep. 162; and *vid. note a* to this case, p. 164.

*Paget.** In that case the Lord Chancellor said: "that during the twelvemonth, the infant survived her mother, she had the legal estate in fee in one moiety, as well as the equitable estate in fee by the covenant; and that it is universally true, that where the estates unite the equitable must merge in the legal."†

It may well be that James shall hold a part and Morey a part. Sabin's purchase was distinct from Wattles's, and grounded on a distinct judgment; and he continued seized till after the assignment. But Sabin acquired the absolute title to the premises discharged of the mortgage. The judgment upon which he purchased was in favor of Wattles for a portion (\$2000) of the mortgage money. Wattles stood by, saw the sale, forbore to give any notice of his own incumbrance, and could not have afterwards set it up against Sabin. He conveyed this perfect title to Wattles, who conveyed to Morey; so that the title to the whole passed to the respondent. In short, Sabin's purchase discharged the premises from James's mortgage, and, being conveyed to Morey, he can hold it quit of the incumbrance. Nor does it vary the case, that Sabin's conveyance to Wattles was after the assignment. It enured to our benefit for want of proper notice that James had an assignment.

It may well happen, that a mortgagee may wish, on purchasing the equity of redemption, to avoid a merger in order to save his own title against intervening incumbrances. In that case alone, will a Court of Equity allow him to do it. But there is no doubt that, at law, there is a clear merger of what was purchased by Wattles; and the conveyance conferring on us a legal title, a Court of Equity will never take this out of our hands, especially when they see that we have the best pretence of good faith.‡ The man who has the legal right shall hold, unless you fix him with notice. This is the language of all the cases. We bought, acting upon this legal presumption. Wattles was in possession, claiming to be owner and offering to sell, holding a full and complete conveyance of the equity of redemption, and clothed with all the requisite evidence of title. Was Morey bound to guard against an unknown assignment—nay, one which had been wilfully, or, at least, carelessly concealed from him, against the strongest ostensible evidence of ownership? Morey acted on the faith of a recorded mortgage, judg-

* 1 Br. Ch. Rep. 363.

† Id. 367-8.

‡ *Johnson v. Stagg*, 2 John. Rep. 524.

ments, executions and sale, public documents, showing a complete extinction of all equitable claims. However fairly James may have acted, the parties must stand or fall by those general principles, which have governed, and must still continue to govern thousands.

Admitting the equity to be equal, who has trusted most? Who has been most vigilant? James's assignment was not recorded. It rested quietly in his pocket or his counting room, and even Johnson, the mortgagor, was never made a party to it.

It is said the entire legal and equitable estates have not united in Wattles. The counsel did not mean to say so. He meant to say that the whole estate in the *whole land* had not united. The land and the estate are distinct. It is enough that the whole estates, *in part*, have met. Suppose a man owning two farms mortgages them, and the mortgagee takes a release or buys in one of them, what reason is there against a merger *pro tanto*? True, there must be a union of the whole legal and equitable *estate*, but need not be as to the whole land. Take the case of tenant for life, with a vested remainder in fee, and a mortgage by the tenant for life. A purchase of the remainder by the mortgagee will not extinguish, because he does not reach the whole estate. So, should he purchase in the estate for life, holding a mortgage of the remainder. But the case of the two farms is directly the reverse, and presents the precise instance in which the equitable estate shall merge as to a part of the land. The difficulty which has been stated in relation to adjusting the balance always intervenes when the mortgagee buys in the equity of redemption, whether it result in a merger or not. The Chancellor will provide for this in the order for an account. A mortgagee in possession is always liable to account. In *Wade v. Paget*, there was a partial merger; and in *Dighton v. Greenville*,* VENTRIS, Justice, said: "If a lessee for years purchaseth the reversion of part, the lease holds for the rest."†

We agree that neither side could have acquired any rights by the recording of their respective conveyances; that the registry acts are inapplicable; and that the Chancellor was incorrect in treating Onondaga as a recording county. But the assignee of a mortgage takes it subject to all the existing equity between the mortgagor and mortgagee.‡

* 2 Ventr. 327.

† *Vid. Vin.*, Merger (G), 1.

‡ *Cruise Dig.*, Mortgage, Ch. 2, §§ 33-4; *Williams v. Sorrell*, 4 Ves. Jun. 389; *Murray v. Gouverneur & Kemble*, 1 John. Cas. 438; *Clute v. Robinson*, 2 John. Rep. 595.

So as to all persons claiming under them. Suppose Johnson had sold to one, who, without knowing of the assignment, had paid off the mortgage, it would be a discharge.

[*Henry.* This we have admitted in terms.]

Morey then bought of Wattles. But notice to the latter did not affect the former. He was protected by his own good faith and want of notice. This is the familiar and settled doctrine of a Court of Equity, and puts an end to this case. Morey proceeded in the most perfect good faith to incur responsibilities and take this security. Suppose after he had taken the mortgage, Wattles had released to him his equity of redemption, without his having notice of the assignment, would not his estate have been absolute and indefeasible, both at law and in equity, notwithstanding the secret claim of James? This would be equivalent to the admitted case of payment without notice of the assignment, and this is the ground upon which the case is properly put by the Chancellor. It is under this notion that Moréy may hold. The equity of redemption is virtually claimed under Johnson. It is a fair corollary from the case of *Williams v. Sorrell*, that James cannot set up the mortgage against any one to whom Wattles could not oppose the same mortgage. Wattles could not set up this mortgage against Morey.

But, at any rate, James must have had notice of Wattles's title. Every man is chargeable with constructive notice of the true title which is vested in the possessor of lands.* In *Berry v. The Mutual Insurance Company*† it is said, that "a second mortgagee, who neglects to have his mortgage registered, will not be relieved against a prior unregistered mortgage, unless, from the non-delivery of possession, or other circumstances, imposition has been or might be practised on him, which could not be detected or guarded against by the exercise of ordinary diligence." And in *Goodtitle v. Morgan*,‡ BULLER, J., says: "It is an established rule in a Court of Equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money upon a mortgage without taking the title deeds, he enables the mortgagor to commit a fraud." And though this particular result may have been overruled, yet the reason

* *Daniels v. Davidson*, 16 Ves. 249; *Taylor v. Stibbert*, 2 Id. 440, S. P.

† 2 John. Ch. Rep. 613.

‡ 1 T. R. 762.

and ground of the remark has not been overruled. Wattles took possession as owner, shortly after the sheriff's sale, with all his muni-ments of title about him, owning in fact, and claiming as owner, of which James was bound to take notice; and of which Morey is entitled to the full advantage.

We have shown that the remedy should be at law, if the assignment is to take effect as a deed of conveyance. In such an event, you may, indeed, reverse our decree, but you can grant nothing to the appellant. He must be put to his remedy at law. We have also attempted to show that this cannot operate as a deed. We add, that it cannot operate by way of estoppel, because, at most, it was a mere quit-claim, especially as to the part purchased by Sabin.

But suppose we are mistaken. Suppose the assignment does operate, upon any principle, as a deed. Now, considered either in this point of view or as an assignment, it is not absolute, but a mere mortgage; and, as such, must have been recorded, in order to take preference of the subsequent conveyance to Morey, who is a purchaser, *bona fide*, within the meaning of the registry Acts. Each are *bona fide* mortgagees, at least, and Morey, having obtained his deed last, though not registered as a mortgage, is entitled to preference as against James, who neglected to register, till after Morey had purchased. We are aware that it was held otherwise by the late Chancellor, in *Berry v. The Mutual Insurance Company*,* but the incorrectness of that decision must be apparent on an attentive consideration of the subject. What was the policy of the Mortgage Act? To give notice against the presumption of absolute ownership arising from the possession of the mortgagor. A man advances his money without the means of knowledge, unless there be a record. This applies to mortgagees as well as purchasers. In *Berry v. The Mutual Insurance Company*, the late Chancellor first decides correctly, that actual notice supersedes the necessity of registry; but the remark, that the omission to register the first mortgage was not capable of producing any mischief to third persons, who would use ordinary diligence and caution, does not accord with common experience. A party relies, and has a right to rely merely upon the record. True, there is no need of a registry, as between mortgagor and mortgagee. But the latter is bound to record merely to guard himself against sub-

* 2 John. Ch. Rep. 603.

sequent, not precedent acts of the mortgagor. It is never a matter of confidence between them, that there is no previous mortgage. That man must suffer, by whose omission to record or give notice, a second mortgagee is imposed upon. This accords with the plain principle of equity, that the one who omits to do a legal act, by which another is misled, shall not set up his incumbrance to the prejudice of the one who is imposed upon. The second mortgage, therefore, may or may not be recorded in perfect consistency with the rights of the second mortgagee, so far as the first is concerned. No one dreams of recording to guard against a previous secret, unregistered incumbrance.

But the Chancellor* says, that "the Mortgage Act evidently speaks of purchasers, in the popular sense, as those who take an absolute estate in fee," and subsequent purchasers of this character alone, it seems, are to be protected. But it is plain that the application is no more to a purchaser in fee than to one for life or years. The terms are broad. No *bona fide* purchaser is to be prejudiced by the previous mortgage, unless registered.† The term *purchaser* embraces one who acquires any interest or estate by his own act. Suppose a first mortgage unregistered, and that another, not knowing of its existence, lends money on mortgage, and on his way to the clerk's office, for the purpose of recording his own, receives notice of the first, and finds it recorded since the loan last made. Now the words of the Act are, that the mortgage first registered shall have preference. Would you construe it literally, and thus defeat the second mortgagee? This would be gross injustice. The Act cannot be, and never has been literally construed.

But, in the eye of a Court of Law, we are purchasers. The appellant says we hold an equitable mortgage, or rather a conveyance which a Court of Equity will change into a mortgage. Is he to be tolerated in asking you to do this, and then calling on you to do iniquity, by giving him the benefit of the change, in taking away a precedent, vested, legal right? The Act,‡ requiring a registry, does not extend to any case beyond a mortgage upon its face, or one made so by a written defeasance. Here our conveyance is to be turned into a mortgage by parol. If there be but a parol defeasance, it may be destroyed by parol, and was so destroyed by the subsequent bargain between Wattles and Morey, fulfilled on the part of the latter.§ Has he not, then, the strongest

* Id. 612.

† 1 R. L. 373, § 2.

‡ Id. § 3.

§ Vid. 6 John. Ch. Rep. 422.

equitable right to say, that, as between him and Wattles, and him and James, he shall be considered an absolute purchaser? A mortgagee is a purchaser, not only at law, but in equity.*

Suppose that Morey did, in his first answer, set up his deed as an absolute conveyance: how could this injure James? The respondent was not bound to do otherwise upon any principle. The bill was one of foreclosure merely; and, therefore, called for no explanation of the deed. Being a *bona fide* purchaser, without notice, Morey might have demurred, or pleaded this fact in bar to any answer whatever. The bill did not charge that the deed was by way of mortgage. If it had done this, and we had not answered in that particular, the appellant should have excepted for this cause; nor would his counsel have been so remiss as not to have done this. The answer was, that the consideration for his deed had been equitably paid by Morey; and this was all that he was bound to say.

But we are told, that because absolute on its face, our deed was fraudulent; and *Cotterell v. Purchase*,† was cited to bear out the position. But surely this is not the law of the land. A deed may, though absolute on its face, be an honest mortgage. The authority relied upon is grounded merely upon the ancient Law Tracts of Bacon. Such a practice may be a fraud in a moral sense, but no one, we believe, ever considered it a legal fraud. It cannot be the latter, unless it works some injury. The cases cited do not profess to overturn the practice of taking mortgages in this form, but only to discountenance it. The case admits the practice of taking a separate defeasance to be an extensive one in the north of England, and discountenances this also. But our statute expressly recognizes it as valid and proper, and *Dunham v. Dey*,‡ sanctions the right of giving mortgages, by way of an absolute deed, with a parol defeasance. James could not be injured by this form, for his conveyance was a prior one.

The decree, that Morey's deed shall stand for a general balance, goes upon the ground, that as he has gone on, in relation to all his responsibilities, upon the same good faith, he is, therefore, entitled to protection. As between Wattles and Morey, this would doubtless be the case;§ and

* 1 Eq. Cas. Ab. 353.

† Cas. Temp. Talb. 61.

‡ 15 John. 555.

§ *Jarvis v. Rogers*, 15 Mass. Rep. 389; *Shirras v. Craig*, 7 Cranch, 34; 1 Mad. Ch. 425; *Hendricks v. Robinson*, 2 John. Ch. Cas. 309; *Lowthian v. Hasel*, 3 Br. Ch. Cas. 162; 1 Eq. Cas. Abr. 324-5, Mortgages (G), pl. 1, 2, 3, 4, 5, 7.

the consequence is the same to James, from his negligence in omitting to give notice.

As to the rent of the premises, we agree that Morey should allow it; and we think it would be allowed, in account, before a master, under the decree. If not, the decree should be so modified as to let in this claim.

T. A. Emmet, in reply. The original bill was filed for a foreclosure, and, of course, the discovery and extinguishment of claims that might prevent a perfect title being made to a purchaser under the decree. For that reason, the respondent was made a party to ascertain the nature of his claim, that it might be paid according to its rightful order, out of the purchase-money on the sale, and be extinguished as respects the new purchaser. The answer claimed, on oath, an absolute title. We then proceeded to show that the respondent's apparently absolute deed was only a mortgage, and state the reasons why the respondent's claim should not be preferred to that of the appellant; and, if it could have any preference, within what bounds that preference should be limited. For both reasons, we set forth our judgment, and the circumstances attending it—not as affording any positive ground of relief here, but as meeting and destroying any claim the respondent might make to a preference over us. If it has that effect, then the prayer of our bill, for a sale on the mortgage, should be granted. If our deed is found not to be a mortgage, and that we must stand on our legal rights merely, and the efficacy of our judgment, as regards the respondent, then he, having filed no cross bill, and prayed no sale, and the priority of our rights being strictly of legal cognizance, and assertable there, the bill should be simply dismissed, without costs, from the nature of the controversy.

In either and every case this decree must be reversed. If our deed be considered as a good subsisting mortgage, or the respondent's rightful claim under his deed extinguished, then so, so far as it gives the preference in payment out of the proceeds to the respondent; and should an account be necessary to ascertain the latter fact, then, in so far as it directs the award made by Az. Smith,* to be made the basis of the account.

But should the court consider that we can only enforce our claim,

* The settlement mentioned in the case, 6 John. Ch. Rep. 434, and referred to *ante*, appellant's 7th point, reason 4th.

whatever it may be, through the judgment, then, the respondent having filed no cross bill and asked for no sale, the appellant's bill must be simply dismissed.

No fraud or misconduct is imputed to us. As to the respondent's mode of answering and disguising facts, I cannot be so liberal to him. But as to the justice of their debts, both stand in equal equity; and the only question is: 1. Whether they stand in equal equity, as to the *security* or *remedy* for their equally just debts. 2. If they do, then, first, which of them is entitled to the benefit of the rule *qui prior est in tempore, potior in jure?* 3. Who has the legal estate, which, in cases of equal equity, he cannot be called on to relinquish?

If it should be supposed that the two preceding points are in favor of the respondent, it then remains to inquire, whether the objects for which he may be entitled to a preference over the appellant, have not been so far accomplished, as that he can no longer interpose any impediments to enforce the appellant's remedy.

1. The parties do not stand in equal equity as to the remedy. The respondent's claim had no existence when the appellant dealt with Wattles. The appellant was totally ignorant that the equity of redemption had been sold at sheriff's sale, and of any of those circumstances which are alleged as to the extinguishment of the mortgage. If these objections should prevail, *he has been manifestly cheated*. The appellant's claim was in existence when the respondent dealt with Wattles, and known to the respondent. He knew of it, and its amount (even if he was ignorant of its technical shape), and intended to take his security subject to its being enforced. If it should be enforced then, he will not be cheated, but dealt with as he originally expected; and if it should not be enforced, he will gain a benefit he did not originally expect, through a fraud practised on the appellant. It is surprising that the Chancellor should think differently. He says the respondent used all requisite diligence. The diligence he used showed him the appellant's claim, the justice of which was indisputable, and the means by which it was secured, regarded as unquestionable.

But the respondent did not use *requisite diligence*. He omitted to make an inquiry that no man should ever omit, and which, if he had made, would have discovered to him that part of the appellant's title, that he now says he did not know. He never required Wattles to show or give him up the original mortgage deed, which was necessary for

making good the title he was taking, and to which he was entitled, either as a purchaser or mortgagee. He knew that the possession of the title deed should be had. He got all the other deeds. Why did he not ask for the mortgage deed? What he got only showed that Wattles owned the equity of redemption. What evidence did Wattles give that he continued to own the legal estate? This raises the presumption that he intended to deal about the equity of redemption only. All the facts of this case concur to show the same thing. What evidence did he give that he continued to own it when he purchased the equity of redemption? As an assignment of a mortgage need not be registered, the registry of the mortgage, or the want of registry of an assignment, cannot prove that fact. Suppose, before the sheriff's sale, Wattles had assigned the mortgage to the appellant, or any other person, who never thought fit to do what no law requires him to do, by registering the assignment; Wattles had then bought in Johnson's title, and made to the respondent the conveyance he has done. Could the respondent protect himself from the mortgage so assigned? Nothing could show him that no assignment was made, but producing or delivering up to him the mortgage deed itself. The production of this alone would show that no fraud was committed, and its possession alone could guard against its being afterwards done. The Chancellor says he placed confidence in the ostensible owner, in one claiming to be the owner, and "*showing in himself the union of the legal and equitable titles.*" How did he show he had the *equitable* title? In fact, he had it not; and the conveyance, giving him the legal title, was for a valuable consideration, assigned by him to the appellant, together with the legal title. He never pretended to be owner after the assignment, but always avowed James's claim. All he said of ownership was before the assignment. The Chancellor says, that it was a matter resting solely in Morey's discretion, whether he would require the production of the mortgage or not. The consequences and existence of this suit show it was an act of negligence. True, the law may not raise any presumption from thence against the *integrity* or *validity* of the purchase; but if he had a right to do it, if the mortgage was the very deed by the force of which only the legal estate was parted with by Johnson and vested in Wattles, it was a necessary title deed, and not requiring its production was negligence; and without any imputation against the integrity of the transaction, it is clear that the respondent must bear the consequences of his own neglig-

gence. He did not bestow confidence on his partner as to the sheriff's deeds, or the assignment from Sabin; and can any reason be assigned why he did not *take all*, or *leave all*, or *ask* about the mortgage deed? and it is to be presumed, that barely asking about it would have elicited the truth. The respondent, then, has not bestowed all requisite vigilance.

The objections against the appellant's equity as to the remedy follow in the Chancellor's opinion.*

Can the appellant be charged with notice, or negligence, in not knowing "from the records" of the county which contained the sheriff's deed, that Wattles had purchased or extinguished the equity of redemption? He was not dealing with Wattles for that—had no reason to suspect or care about it, and the recording of deeds has never been held notice to any one. It is not the object of the recording Acts. These were passed to preserve the evidence of titles, in which hundreds who cannot have the custody of the deeds may be interested; and in some degree to facilitate the searches of those dealing on the subject matter. And could it be called negligence that he did not stop the negotiation till he sent to search the records of Onondaga County, to ascertain a fact that could not reasonably present itself to his mind? Is the Chancellor then correct when he says the appellant knew (which is entirely unfounded) or was bound to know, *for it was matter of record*, that Wattles had purchased? Its being matter of record only *gives him an opportunity*, but puts him under no obligation to make the search; and the position is contrary to *Morecock v. Dickens*,† *Bushell v. Bushell*,‡ and *Williams v. Sorrell*.§ He did not take a mortgage, because he did not know of the sheriff's sale; and if otherwise, it would not cover Sabin's purchase. But the assignment was not recorded, and for that reason the Chancellor calls the appellant a *secret assignee*, brands the assignment as a secret one, and (what I do not understand) calls the mortgage itself a *suspicious instrument*. How suspicious? It at least was registered; and how was it calculated to put him on inquiry? But wherein is the assignment secret? Was the respondent's more public? Is any instrument ordinarily executed with more publicity? How was he to avoid the *secrecy*, for his own protection, as even the registry would not be notice, nor proclaiming it in Onondaga Village? It was only an affair between

* *Vid.* 6 John. Ch. Rep. 430.

† Ambl. 678.

‡ 1 Sch. & Lef. 103.

§ 4 Ves. 389.

Johnson, Wattles, and himself. How does it appear he did not give actual notice to Johnson? Even as to him, registering the assignment would not be notice, *Williams v. Sorrell*, 4 Ves. 389. It is not required by any law, and it would bind no one in his favor. *Arguendo*, in *Williams v. Sorrell*, Mr. Pigott said, a subsequent purchaser or mortgagee would be bound to look; *but that is under the express words of the English statute*. Why then should he be obliged to do an act that could avail nothing to the protection of his own rights, and is not by law required for the protection of others? The Chancellor says: "It was the *only* way in which Wattles could be prevented from practising a fraud." If so, why had not the law required it? But it is not the *only* way. The *only* way is that habitually taken in England, where, except in a few counties, there is no registry, and which every prudent man of business requires here—for the respondent to demand the mortgage deed as a necessary title deed. If he had done it Wattles could have practised no fraud, if he intended one; and, as he omitted to do it, he, and not the appellant, should suffer by the omission. How by any one act, within the appellant's knowledge, was Wattles suffered to claim and deal with the land as the absolute owner? After the 9th November, 1818, he never proposed to sell without mentioning that the appellant's incumbrance must be paid. Would recording the assignment of the mortgage have prevented his claiming to be the absolute owner under the sheriff's deeds, or Johnson's pretended quit claim? Public notice at Onondaga is talked of. Would public notice have bound any one to whom it was not specially brought home? It would have done him no good, and is not required by any regulation, or law.

2. But supposing their equities equal, which is entitled to the benefit of the rule, *qui prior est in tempore potior in jure?* Clearly the appellant: 1st, if his deed have any operation; or 2d, if the first specification of the judgment was valid; or 3d, if its invalidity was dispensed with from the respondent's actual knowledge of its existence.

First. That the deed has some operation, the Chancellor in his decree admits, when he directs the residue of the proceeds to be brought into court for the appellant. It would be absurd to say it had no operation as against Wattles being *bona fide* and for a very full consideration, and it remains to see whether it has not the same against the respondent, who came in under Wattles after the rights between the appellant and Wattles were fixed; and came in, moreover, expecting to give to the

appellant a preference for the very claim, a part of the security for which is this very deed. The appellant's rights were fixed 9th November, 1818, but the respondent's did not commence till June 14, 1819.

The objection to it is, that the mortgage is merged by the purchase of Wattles at sheriff's sale; but it is confessed that even this cannot operate as to the part then bought by Sabin. That, therefore, seems now surrendered, and the decree must be *pro tanto* reversed. But we go farther, and propose to show that the objection has no validity as to any part of the property.

If there were any merger, the result would be that the equity of redemption merged in the *legal estate*, without the possibility of being revived, and that it could not be enforced against him in whom was vested the legal estate. We do not contend for this absurd doctrine, though it is the legitimate deduction from the principles contended for on the other side. We say it has no existence at all, and admit that the recital and *habendum* in our deed perpetuate and secure the equity of redemption as a *benefit to Wattles or his future assignees*.

But the truth is, the *legal* doctrine of merger has no possible application here, or any where between a legal and an equitable estate. The confusion arises from an incorrect use of terms. A legal merger is only where a smaller and a larger *legal* estate meet in the same person. Then, by *operation of law*, the smaller estate sinks into the larger and is lost, *whether the owner of the larger estate wills it or not*. His intentions can have no possible effect in controlling this operation of law. Nor can a Court of Equity interfere with it, except where the smaller estate was created for some purpose that is peculiarly under the protection of a Court of Equity: As in the English settlements of estates, where long terms of years are created for raising portions for younger children. There, if the inheritance should descend on the trustee of the term, doubtless, a Court of Equity (without interfering with the legal merger, which neither a Court of Chancery nor a Court of Law could control,) would compel the trustee to perform the trust, if any objects of the trust still remained to be satisfied. *That* is the only case in which a Court of Equity can interfere with the consequences of a *legal merger*. But there is another case arising out of such settlements, in which no *legal merger* takes place, and a Court of Equity considers the trusts preserved or discharged on fair equitable principles. Where the inheritance, instead of descending on the trustee of the term, has

descended on the *cestui que trust*, for whose benefit the trust was created. It there holds the trust preserved or discharged, according to the intention of the *cestui que trust*, and if no intention be expressed or indicated, or from want of capacity cannot be permitted, it then presumes an intention from the party's interests. This is the result of all the cases.

The same is the doctrine where the equity of redemption comes to belong to the same person who owns the legal estate as mortgagee, or assignee of the mortgagee. He has an equitable and a legal interest in the same lands, and both entirely under his control. If he has any wish or object for keeping alive and distinct the equitable estate, he has a right to do it, *no doctrines of legal merger interfering, which works all its effect by operation of law, neither consulting nor permitting the intention of the owner to be at all regarded.* As in the case of trust terms, if no intention be manifested by acts, the Court of Equity will presume it from the interest of the party, and where he has manifested no intention, and there is no interest or reason to keep it up, it will be held that the trust is extinguished. This doctrine is very clearly illustrated in *Forbes v. Moffatt.**

But this extinguishment, in its principles, not only differs from the law of legal merger in the circumstance that the intention of the party is paramount, but also in this, that a legal merger having once taken place cannot be undone, and the estate revived, but the party controlling the trust and equitable estates may change his inclinations and resolutions as often as he pleases, until some right of a third person shall be so created and vested as to make it inequitable that he should, in future, change his intentions. The impossibility of opening a merger at law is, because it is produced by operation of law, regardless of any one's intention. The reason why in equity it is in the power of the owner of the two interests to change his intentions, while no vested interest of any third person is involved, is, that every thing depends on his will; and, like his testament, he may change it to answer new views, or perhaps new family exigencies. A legal merger takes place, *eo instanti* the two estates unite—it cannot be stopped—it cannot be undone. But there is no precise or given time within which the owner of the two interests must elect whether they shall continue separate or unite. In *Forbes v. Moffatt*, the question, after the death of the party

* 18 Ves. 384, 390.

so situated, was tested and discussed by all the acts of his life for ten years. In *Powell v. Morgan** the question was decided by the *last will* of the person so situated, and so in *Thomas et ux. v. Keymish*.†

From this complete control of the owner another principle follows peculiarly applicable to this case. When the party is doing any act which would be a cheat or a fraud upon a third person, if the two interests were not kept separate, or, *vice versa*, if they were not combined, equity will control his will to commit a fraud, and will force him to do what he has a right to do, so that he shall not cheat a third person; and that third person having acquired a vested right, the mutability of the owner's intention is fixed by it.

The question, what is for the owner's interest? seems to me not to arise, unless where its examination is necessary for the purpose of presuming an intention, where one has not or could not be expressed by the owner of the two interests. In this case, however, although the acts of Wattles have superseded the necessity of examining as to what his interests would be, it may, without injury to us, be resorted to. He had a clear and most direct interest in keeping the two estates separate.

In this case, the equity of redemption could only sink under the presumption that Wattles intended to consider the trust entirely discharged. If so, then he could recover no part of it from Sabin's proportion of the mortgaged property; and as Sabin would have contribution against Wattles's share, the consolidation of the two interests cannot be presumed, unless it appear that he intended to exonerate Sabin's share of the land from all liability to the incumbrance. Otherwise the separation of the two interests must exist both for his and Sabin's benefit. But further, that property was a lawful fund by which Wattles might raise money.‡ It is asked why he did not mortgage anew for that purpose, what he bought in. The answer is obvious, because then he could only have mortgaged three-fourths of the whole. Then, suppose the appellant, or any other person dealing with him for a loan, and even (what was not the case here) acquainted with his purchasing under the sheriff's sale, but knowing or believing that he could separate or unite the two estates according to his interest or pleasure; what would be the views of the parties? "Mr. Wattles, you want \$12,000; if you assign me the Johnson mortgage, as it covers

* 2 Vern. 90.

† Id. 348.

‡ *Jackson v. Willard*, 4 John. Rep. 41.

the one-fourth purchased in by Sabin, I have no objection on that security to lend you to the full amount; but if you choose to consider the equity of redemption as merged in the legal estate, and to give me a new security, then you can only give me a security on the three-fourths purchased by you. I cannot lend you on that security at the very utmost more than \$9000." Indeed, in this very case, it is manifest, that if it was supposed Wattles could only give a security on his own three-fourths, it never would have been accepted by the appellant.

It was then clearly for his benefit that the two interests should continue disunited. What were his intentions? No expressions used by him which had relation to the pretended deed to him from Johnson, can apply to this point. If there ever was any such deed, it was a cover for Johnson against his creditors, and it is not pretended that Johnson was ever dispossessed in consequence of it.

The only important expressions as to his intention are after the sheriff's sales, and before the transaction with the appellant. I have already said that if they expressed the clearest intention, he had a right to alter it, for the purpose of effecting this transaction. They do not, however, they only express the simple fact, that he had the control of both interests, and could do what he pleased, that is, whatever his intention might lead him to do with the property. What that should be was not determined till he came to actual dealing about one or both of the interests. This first occurred with the appellant. Do not his acts here sufficiently show his intention to keep them separate, to raise more than he could by letting the equity of redemption sink and making a new mortgage of only three-fourths of the whole? The Chancellor in discussing this question of the extinguishment of the equity of redemption says: "It is preserved only when the intention of the party is distinctly declared at the time."^{*} What time? "Or where something just and beneficial requires the charge to be preserved."[†] Now can anything be more just or beneficial than to prevent the commission of fraud? The Chancellor looking only at one side of the question, and therefore looking only at one fraud, says:‡ "I believe there is no instance to be found in which the charge has ever been kept on foot by the court, when third persons have been invited to deal with the party on the legal presumption of merger, and when a fraud would be committed if the merger was not permitted to operate

* 6 John. Ch. Rep. 423.

† Id.

‡ Id. 424.

according to the principles of law." May not this be turned, *where a fraud would be committed if the union were held to have taken place.* Again he says,* the doctrine of *Forbes v. Moffatt*, is, "that a person entitled to an estate subject to a charge for his own benefit, may, if he choose, take the estate and keep up the charge." If he can do so, should not he be forced to do so, where doing otherwise would be to practise a fraud? and in the same way, would not doing an act which would otherwise be a fraud on a third person, be doing something by him to keep the charge on foot?

At this time, no one but Wattles and the appellant had any interest in the matter. The very assignment for value, therefore, fixed the rights of both. After that, no transaction between Morey and Wattles could alter or impair the appellant's rights. And I cannot but think (when Wattles gave that much, and no more, and when it is confessed that the respondent knew of the appellant's claim to its full amount, without any suspicion of its invalidity) that Wattles only intended to convey to the respondent an interest as second mortgagee in the equity of redemption; and that Morey did not contemplate deriving his own security out of more.

But if the deed could not be supposed to assign the old mortgage, as it certainly conveys to the appellant (which I shall now assume) the legal estate, and subjects it to a condition of redemption, on payment of a certain sum of money, the payment of the full consideration will make it operate, in some way, to the appellant's benefit. Could Wattles contend that such a deed, on full consideration, was a mere nullity? As to him, and those deriving under him, therefore, if it cannot operate more favorably for the appellant, it must be regarded as a new mortgage. That certainly was not the thing contemplated by the parties, and there were no laches in not recording it as such. But suppose that law applicable to it; Morey neither registered his deed nor defeasance, and the case would come entirely within that of *Berry v. Mutual Insurance Company.*† I must refer to, and rely on the reasoning in the report of that case. If that be law, our first mortgage has then the preference, and must be first satisfied.

But, secondly, setting the assignment of the mortgage aside, he undoubtedly knew of the judgment docketed 12th November, 1818. Whether he knew of it or not, if the specification be good, it binds the

* John. Ch. Rep. 424.

† 2 Id. 612.

property. The decision in *Lawless v. Hackett** goes beyond the statute, and is unsound. The Chancellor's decision in *Binkerhoff v. Marvin*† was clearly made only in conformity to that of the Supreme Court. The consequences of that decision were the repeal of the law itself.

But, *thirdly*, if the specification be not good, that does not make the judgment void and a nullity, as is alleged. Supposing a mortgagee to be a purchaser within the meaning of the Act, yet he must also be *bona fide*, and for valuable consideration. These two expressions are not synonymous, for then the law would have simply said "purchasers for a valuable consideration," but, in addition to their being purchasers for a valuable consideration, they must be *bona fide* purchasers. That expression cannot apply as between seller and purchaser, for there the payment of the valuable consideration operates everything. The expression *bona fide* must relate to the good faith and honesty of the transaction with regard to the rights or interests of third persons, who have antecedent claims; the first and most conspicuous of whom is the judgment creditor. The law does away the obligation of the purchaser to know and be bound by the judgment, merely because docketed. It does away the effect of that notice, but it preserves the effect of *actual knowledge*, by force of the words *bona fide*. The doctrine is quite false, that a man might say to the judgment creditor, "I know you have a judgment, but your specification is defective, and I will buy." Suppose a man who saw the inventory and valuation made, saw the goods sold, was present at the bargain, and saw the bond and warrant given for them, and the judgment entered up: would it be tolerated that he, finding some fault in the specification, should buy the land he knew was intended to be covered by the judgment, and then claim to be a *bona fide purchaser*?‡

3. But the equities being equal, it is also a serious point to consider, who has the legal estate? for then *ceteris paribus*, a court would not take the legal estate away from the person having it. The respondent's counsel, regardless of the priority of our transaction, and assuming the monstrous position, that as between Wattles and us, the deed for which a consideration of \$9000 was given, *passed nothing*, though Wattles had then a right to pass everything, have taken for granted that Wattles's deed to Morey gave him the legal estate. But it certainly did not; for

* 16 John. 149.

† 5 John. Ch. Rep. 320.

‡ *Dunham v. Dey*, 15 John. 555.

Wattles had not then the legal estate in himself to pass over. He had parted with it to the appellant, and whatever trusts (if any) the appellant can be affected with, he has still the legal estate. Morey has, indeed, acquired the possession—how? but as a mere tenant. Wattles and Johnson were in possession; and from the nature of a mortgage, were in as tenants to James, the interest being the equivalent of the rent. In November, 1818, the partnership of D. Morey & Co. commenced, and, by agreement, Morey, in the beginning of 1819, went into possession of the property, and shortly after Johnson moved off. Morey paid rent from the beginning, nor did his deed of 14th June, 1819, alter his situation. He continued a *tenant still*, paying rent, and has charged himself with it in his accounts to their close, down to 16th September, 1820; and even if he should be allowed to hold the property, he must pay rent for it to the time of selling it under the decree* (which the Chancellor has omitted to direct). He must, therefore, be considered as in by sub-tenancy under the appellant. His possession, which accrued before the 14th June, 1819, and always continued by paying rent, is the appellant's possession, and he cannot now be permitted to turn that into an adverse possession, destructive of the appellant's rights, which, in truth, it enured to fortify. That he cannot be permitted to hold against the appellant; and the question recurs, who has the legal estate?

This point can admit of no dispute, unless the idea can be tolerated that, as between Wattles and the appellant, the deed of the 9th November, 1818, for a valuable consideration, passed nothing! This the respondent's counsel contend for, without distinctly avowing it; but they say it does not transfer the mortgage—it does not make a new mortgage—it does not convey the legal estate, discharged of any equity of redemption. What, then, did it do on the 10th November, 1818, and who, on that day, had the legal estate? It is said not to pass the absolute estate, free of equities, on account of the recital and the *habendum*. We never contended it did; but only said, that was a consequence of their doctrine, that the equity of redemption was inseparably united to the legal estate; which, if true, would make the *habendum* inoperative. Our bill was filed on the principle that the equity of redemption continued; and we admit the *habendum* is evidence of that fact; but the *habendum* does not purport to enlarge, diminish or alter the legal estate

* This result was agreed to by respondent's counsel.

from what is given in the premises;* and still less to do the absurd act of taking it entirely away, which would make the *habendum* itself void. What, then, in a deed for a valuable consideration, sufficient to make valid a bargain and sale, and for a further consideration, set forth in the recital, of securing \$9331, is the effect of the words "grant, bargain, sell, etc.?"† But they say the limitation in the *habendum* is "as fully as *I* might hold and enjoy the same by virtue of the mortgage deed within."‡ Independent of the fact, that he had an election to keep up the mortgage, the whole of his own legal estate was derived from, and enjoyed under that very deed of mortgage. He had the legal estate against Johnson before the sheriff's sale. That passed nothing to him or Sabin, but the equity of redemption. After Sabin purchased Johnson's right, title and interest, who had the legal estate in that very lot he bought? Wattles. Under what did he enjoy it? Could Sabin have resisted an ejectment brought by Wattles? Test the legal estate by seeing who could bring ejectments. If Johnson had obstinately remained in, and James, from non-payment of interest, had determined to put him out, who should be the lessor of the plaintiff? If Wattles were, could not Johnson nonsuit him by the production of the assignment? If the appellant were the lessor of the plaintiff, could he be nonsuited because the legal estate still continued in Wattles? Could not the appellant have ejected Sabin? If the appellant had gone into possession, could either Johnson, or Wattles, or Sabin have ejected him? Clearly, up to the 14th June, 1819, as against all the world, the appellant had the legal estate. If so, how could the deed to the respondent from Wattles, on that day, affect his legal estate? Wattles had it not to pass, and therefore did not pass it. If the appellant had brought ejectment against Morey, showing his deed, and that Morey came in as a tenant, and paid rent, for the enjoyment of the premises to Wattles, whom the law would regard as the appellant's tenant, could he nonsuit the appellant? On the other hand, if the appellant had got into the possession, could Morey eject him? All these positions show that the appellant has, and Morey never had, and could not have the legal estate.

But it may be said, why not leave us to our remedy at law? That, at least, the court must do for us, if they cannot do better. But to do that, they must reverse this decree; for how can we be left to our legal remedies, when the decree directs the estate to be sold, and, of course,

* *Vid. post*, opinion of WOODWORTH, J.

† Id.

‡ Id.

our legal rights to be barred. That objection, however, does not prevail against the court selling for our benefit, under our mortgage, as in every case of a mortgagee filing a foreclosure bill, he necessarily has the legal estate, which he might, as such, enforce at law; but he comes into equity to have the property so sold as to extinguish every claim to redeem in favor of the purchaser under the decree, and that is the proper course wherever any one claims the benefit of a trust or equity, which, on payment of the money secured by the legal estate, the owner is desirous of having extinguished.

4. But supposing it possible to decide all the previous points against us, it still remains to inquire, whether all the objects for which the mortgage was made to the respondent, and for which he may be entitled to a preference over the appellant, have not been so far accomplished as that he can no longer interpose any impediment to the appellant's enforcing his remedy?

The objects for which the mortgage of this property to the respondent, and the assignment of Wattles's interest in the partnership stock were made, are set forth by the respondent in his answer. They are the Auburn note and the Wattles and Granger debts. The respondent nowhere avers that there was even any parol agreement between him and Wattles, that these securities should extend to any other debts or transactions. He insists on no such thing in his answer, but simply says that he holds possession under and by virtue of his deed, as a security for the balance due him from Wattles. That must be referred to the balance due under the only agreement he has stated, or that any witness has pretended to state, to wit, to secure for the note and the Wattles and Granger debts. If he had a preference under his mortgage, and any such balance were due, his right of retaining, *pro tanto*, might be insisted on. But it will not be contended that the partnership property assigned was not fully adequate to pay them. And if the respondent did not claim to hold against the appellant for other purposes, there would now be no room for controversy. As he never bargained for it, if he cannot do so, he has lost nothing, on the faith of which he ever gave any credit; and if he can do it, he deprives the appellant of a security for which he unquestionably agreed and paid. The Chancellor has supported his right to do so, on the ground of a parol agreement between Wattles and him, to sell the property (in which, observe, the appellant's lien was always kept in view, and its discharge made an

essential stipulation), and that was in a great degree performed by the respondent. Now suppose that the fact still, how can it affect the vested rights of the appellant. His judgment was perfected the 21st August, 1819; and, although it might not reach the interest acquired on the antecedent 14th June, that is, to secure the note and the Wattles and Granger debts, yet it would undoubtedly be a prior lien on any interest he might acquire by the subsequent agreement to purchase, which only took place in December, 1819. How is it possible that the breaking off that agreement can justify the respondent's retaining, for simple contract debts of Wattles, contracted after the appellant's judgment had become perfect, and a lien on the property? Besides, whatever the respondent may have done under that partial agreement, it is clear he abandoned, and wanted to get rid of it. Yet the Chancellor goes on and says, "he was dealing," etc., "without any notice of the assignment, or that any claim was still existing under it;" but he certainly knew of the judgment, which, on the antecedent 21st August, was made an unquestionable lien on the property; and can he have priority to the lien of this judgment? Even where the mortgagee may tack a subsequent debt against the mortgagor, his heir or beneficial devisee, he cannot do it against creditors, or trustees for creditors, or other persons entitled for a valuable consideration.*

The Chancellor goes on laying down, but not applying the doctrine correctly, that it may be unobjectionable, "if no intervening right exist to prevent the application of the rule;" but he does not seem to advert that a judgment perfected on the 21st August was such an intervening right; and, in the same way, totally forgetful of that judgment, he goes on and says: "here the plaintiff, under the circumstances, has no right to complain, considering what kind of security he took, and from whom, and that notice of the assignment was not given until long after the accounts were closed." Suppose all that true and pertinent, why is our judgment, made perfect on the 21st August, 1819, disregarded or overlooked?†

But even if any of those simple contract debts could afford ground for retaining possession, what would they be? Certainly not those contracted before the 14th June, 1819, for they would have been specified,

* *Lowthian v. Hassel*, 3 Br. C. C. 162; *Coleman v. Winch*, 1 P. Wms. 775; *Hamerton v. Rogers*, 1 Ves. Jun. 513.

† *Vid.* last paragraph but two of Judge WOODWORTH's opinion, *post*.

as well as the Auburn bank note and W. and G.'s debts, if it had been the intention of the parties; and as the parties, at the time, excluded them, it is impossible to include them now.

Neither can any simple contract debts, after our judgment was perfected, on the 21st August, 1819, gain a preference over its lien, either with or without any agreement to which the appellant was not a party. Then it could be only those in the intermediate space between 19th June and 21st August, 1819.

WOODWORTH, J.—On the 17th June, 1817, Caleb Johnson gave a mortgage to James O. Wattles, to secure the payment of \$12,000. On the 2d August, 1817, a judgment was docketed in favor of Wattles against Johnson for \$2000. Executions issued on this, and three other judgments (all subsequent to the mortgage), and on the 20th April, 1818, the mortgaged premises were sold in separate parcels. William H. Sabin purchased the first parcel for \$205, which, at the time of sale, was worth \$2000. Wattles purchased the residue at \$440.

The value of the mortgaged premises appears to have been somewhere between \$6000 and \$10,000. Deeds were executed by the sheriff to the purchasers.

Reuben West testified, that before the close of the sale, he heard Wattles publicly say, he had a mortgage on the property, executed by Johnson.

Several other witnesses testify, that they were present, and heard no claim set up under the mortgage. It is in proof that before the sale, Wattles, at different times, stated that Johnson had given a quit-claim deed of the premises. This evidence, however, is insufficient to establish a release: it was so considered by the Chancellor, and was not pressed on the argument. After the sale, Wattles repeatedly declared he had purchased the equity of redemption, and that his title to the property was then complete. Notwithstanding these declarations, it is very evident he did not consider the mortgage extinguished. Nicholas P. Randal testified, that after the sale he asked Wattles, why he let Sabin bid off the property for so small a sum? he answered that Sabin would be glad to give it up, as he had enough upon it to induce him to do so. Randal believes that the mortgage was mentioned as the incumbrance on the property. Whatever may have been the opinion of Wattles as to the then state of his title, it is apparent he did not consider the mortgage a mere *caput mortuum*, but a valid security.

On the 9th November, 1818, Wattles for the consideration of \$9331 assigned the bond and mortgage of Johnson to the appellant, and covenanted that there was due \$12,000. On the same day, for the purpose of giving additional security, he executed a bond and warrant of attorney to confess a judgment, which was docketed on the 12th November, 1818. On the 21st August, 1819, an amended specification was filed. On the 26th May, 1818, Sabin assigned all his right and title in the mortgaged premises to Wattles. On the 14th June, 1819, Wattles quit-claimed the premises to the respondent for the alleged consideration of \$10,000. The deed, though absolute in its terms, was given to secure the respondent against a note of \$5000, and a bond of indemnity executed to Amos P. Granger. As additional security, Wattles made an assignment, dated June 14th, 1819, of his share of the partnership goods and effects in the firm of D. Morey & Co., and also all the personal property belonging to him, then at their distillery, ashery, store and shop in Onondaga. Under this assignment the respondent became entitled to, and actually received a large amount of merchandise, with other articles, which constituted a fund to be applied to the particular objects specified in the assignment. What the result would be on an account taken, cannot at present be particularly ascertained, nor is it material to inquire, if the appellant is entitled to hold the mortgaged premises to satisfy his claims.

The appellant appears to be a fair purchaser of the bond and mortgage; John Meeker was justly indebted to him in \$9331 for goods sold; Wattles assumed the debt, and Meeker was discharged. As a consideration for this responsibility, Wattles received from Meeker a large amount in goods, which afterwards passed to the firm of Morey & Co. The bond and mortgage were taken in the regular and ordinary course of business. Nothing like unfairness is discoverable, and the appellant dealt with the mortgagee on equal terms. The assignment was not a suspicious instrument, as his Honor the Chancellor seems to consider it. Such a conclusion casts a shade over the transaction, at variance with its real character.

The most important question is, whether the purchase of the equity of redemption, by uniting the equitable and legal estate, created a merger, and thereby prevented the mortgagee from setting up the mortgage as a subsisting security.

The rule is, that wherever a greater estate and a less coincide and

meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be merged, that is, sunk or drowned in the greater, 2 Blackst. Com. 177; 3 Lev. 437; 2 Rep. 60, 61.

I have not met with any case where the question of merger was raised, on the union of part of the equitable and legal interest; yet do not perceive any valid objection to allow it *pro tanto*.

The inquiry now is, does the doctrine of merger apply? In *Jackson v. Hull*, 10 John. 481, the mortgagee obtained judgment, and, on execution, the equity of redemption was sold to a purchaser for less than the debt. In an ejectment by the mortgagee, to recover the premises, the court considered, that the sale was only of the *residuum* of interest, remaining in the mortgagor, after the execution of his mortgage, and that the mortgagee was entitled to recover.

In Co. Litt. 338 b. it is said, "mergers were never favored in Courts of Law, and still less in Courts of Equity." They are never allowed, unless for special reasons, and then only to preserve the intention of the parties, 15 Vin. 362 (A. 5.); *Phillips v. Phillips*, 1 P. Wms. 41.

Where there is an union of rights, equity will preserve them distinct, if the intention so to do, is either express or implied, 4 Brown, C. C. 403. The distinction stated by Lord HARDWICKE is, that when the owner of the fee, in which the charge would otherwise merge, manifests his intent that the charge should subsist, his intent, if clear, shall prevail, *Chester v. Willis*, Ambler, 246; 2 Fonbl. 169, note *a*. In *Compton v. Oxenden*, 2 Ves. Jun. 264, Lord THURLOW observes: "It is a clear principle, both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there is an immediate merger, but that equity will preserve the rights distinct, according to the intent express or implied. Wherever it is more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent." The argument on both sides seems to have proceeded in accordance with these principles; the respondent contending that Wattles had uniformly manifested his intention to consider the mortgage merged, by declaring himself the absolute owner of the premises purchased at the sheriff's sale.

The offer of Wattles to sell as absolute owner, and his declarations

prior to the assignment of the mortgage to the appellant, are supposed by the respondent's counsel to be decisive on this question; but I apprehend they ought not to be viewed in that light. Whatever opinion Wattles may have formed on the question of law under discussion, it is perfectly clear he did not consider his mortgage extinguished, for immediately after the sale he speaks of the mortgage as the incumbrance relied on to induce Sabin to give up his purchase. He may have declared that he was the owner, but in making out his right to that character, he evidently did not lose sight of an existing mortgage, and considered it as forming a part of his title. Whether he had correct legal notions on this question is perfectly immaterial; the point is, did he declare or intend to declare that the mortgage was extinguished? If he did not, the proof is defective. His view of ownership, we must understand, as consistent with a valid incumbrance by way of mortgage. His declarations were substantially correct, at least, so far as any purchaser could have an interest; and, admitting the mortgage was not merged, yet Wattles, having an election to treat it in that manner, might well offer to convey a good title; for the moment he executed a conveyance of the fee simple of the estate, then his election having been carried into effect, the purchaser would acquire a good title, and the mortgage be extinguished. No fraud would be committed; for, until Wattles acted, his declarations were indifferent. Until there was some person in interest, no one had a right to complain, whether he represented himself as owner, or rested on the mortgage as a valid security. Whatever Wattles may have said, one fact of decisive importance is conceded—no individual obtained any interest or claim upon the premises, from the 20th April, 1818, when the sale took place, until the 9th November following, when the assignment to the appellant was made.

But there are other facts in this cause, which, on the supposition that Wattles was of sane mind, are irreconcilable with the idea of merger. That portion of the premises bought by Sabin was worth, unencumbered, \$2000; it was bid off for \$205. Would the mortgagee stand by and permit this purchase, if resort could not be had to his mortgage? Could he have so intended? Certainly not. When he purchased the residue himself, did he intend that the mortgage should merge thus far, and take his chance of establishing its validity as to the portion purchased by Sabin? I apprehend not. His security and interest con-

curred, in suffering the charge to remain. Besides, it is in proof that the mortgaged premises were not equal in value to the amount due.

If the mortgage is extinguished, on the principle of merger, it can no more be set up, than if it had been fully paid. What, then, becomes of the bond? If the mortgage is satisfied, it is declared that the bond, given as collateral security, shall also be void. Could Wattles have intended to abandon all claim to the residue? and if not, did he, against his interest, intend that a merger should take place and unnecessarily risk the issue of the question, whether Johnson was any longer holden on the bond?

But if Johnson was not exonerated, what is to be the measure of recovery? How is it to be ascertained? If entitled to relief when prosecuted on the bond, it must be by drawing the mortgagee into an expensive litigation in Chancery, in order to ascertain the extent of his liability, and how much shall be credited to him from the face of the bond?

But the conclusive answer to the argument, derived from the declaration of Wattles, that he was the absolute owner, is this: until he made a disposition of the property, and until some person acquired an interest, he was at perfect liberty to consider the mortgage merged or not, as might be most beneficial. If the question is to be decided by intent, express or implied, when does it become fixed and unchangeable? Certainly not until some one acquires an interest, and thereby obtains a right to draw it in question. It would be novel in principle, and I apprehend without precedent in any book of authority, that a stranger should urge, "you once declared the mortgage was merged, and, although, at the time, it was indifferent to all the world in what manner you treated it, you are bound by that election."

It does not appear that Wattles had done any act previous to the 9th November, 1818, which prevented his setting up the mortgage as a charge on the land. On that day he made his election, acted under it, and for a *bona fide* consideration, assigned to the appellant. The intention not to consider the mortgage merged, then and not before, became fixed. At this time there was no conflicting claim.

There is no principle of law or equity with which I am acquainted, that can, on the present state of facts, rightfully deprive the appellant of the security thus taken. Whatever question there might be as to Wattles's intent previously, none could exist after this transfer.

But it is contended, that the appellant was bound to record the assignment, in order to protect himself against a subsequent transfer by Wattles. The received opinion has been, that (except in certain counties) an assignment need not be recorded.

The premises in question do not lie in what is termed the military tract, and consequently are not governed by the Act, requiring all deeds and conveyances of or concerning, or whereby any of the military bounty lands may be affected in law or equity, to be recorded.

The Act of March 23, 1821, first directed the recording of deeds, conveyances or writings concerning lands in the towns of Onondaga and Salina, where the premises are situated. The Act concerning mortgages (1 R. L. 372), prescribes the manner in which the mortgage shall be registered, but does not extend to the case of an assignment; it was therefore optional with the appellant to record or not. The omission cannot be urged as a ground to postpone his security.

If the assignment had been recorded, it would not have been noticed, for the plain reason, that recording was not required by law. The principle is well settled, that when an assignment of a mortgage takes place, without the privity of the mortgagor, the assignee takes subject to the account between the mortgagor and the mortgagee, *Matthews v. Wallwyn*, 4 Ves. Jun. 118, and that payments to the mortgagee, after assignment, without notice, must be allowed by the assignee, *Williams v. Sorrell*, 4 Ves. Jun. 389. I apprehend this is all the risk the assignee incurs. I have not met with any case that places the rights of the assignee on other or different ground, or that gives countenance to the suggestion, that the assignee must, at his peril, give notice to a subsequent assignee, or purchaser from the mortgagee. Such a doctrine is not only most unreasonable in itself, but would shake the foundation of security by mortgage assignment, hitherto deemed equal to that of the original mortgage, with the exceptions I have stated. It would, in fact, be no security, beyond the responsibility of the person making the assignment; for the assignee has no means of ascertaining how often, and to whom, the mortgagee may have subsequently assigned. Such notice is not necessary for the protection of a subsequent purchaser. The registry of the original mortgage is notice to him of its existence. If he will deal without asking for the mortgage or requiring it to be cancelled, he comes, without a semblance of equity, to demand that the prior *bona fide* assignee shall be postponed to his claim. Where the

mortgagee makes a second assignment, the assignee knows that a prior assignment may have been made, and consequently must, as to that fact, repose on the responsibility and integrity of his assignor. If he should be deceived, it is more equitable that he should suffer, than to divest the right of the first assignee, who had acquired the legal estate.

But is this pretended hardship anything more than every purchaser of land was liable to, since the existence of this government, until the last Acts requiring deeds to be recorded? Every grantor had the power of conveying a second time, and no doubt the power was sometimes exercised by fraudulent individuals. It was never seriously urged that the second purchaser had any remedy against the first purchaser, because his deed was not recorded or notice given.

The conveyance by Sabin to Wattles, on the 26th May, 1819, does not change the rights of the appellant. There being no merger as to any part of the mortgaged premises, the mortgage stands valid, and is not affected by any of the subsequent transfers.

But it is contended by the appellant, that independent of the assignment, he gained a priority, in consequence of the judgment docketed against Wattles, November 12, 1818. The Act of April 21st, 1818, required the filing of a particular statement and specification of the nature and consideration of the debt or demand. If omitted, the judgment shall be adjudged fraudulent, as respects other *bona fide* judgment creditors, and every *bona fide* purchaser for valuable consideration. According to *Lawless v. Hackett*, 16 John. 149, the first specification did not comply with the Act. I am not inclined, at this day, to unsettle that rule. It has been acted upon and recognized in the Supreme Court, and in Chancery, as giving the true construction of the statute. No doubt, valuable estates have been acquired and are now held under it, though if it were *res integra*, it might be questionable whether the statute required so minute a specification. The judgment, then, under the first specification, cannot avail, if the respondent is to be considered a *bona fide* purchaser for valuable consideration, within the meaning of the Act.

It is held, in England, under the statute 27 Eliz. respecting conveyances made to defraud purchasers, that a mortgagee is a purchaser, within the Act, although the statute speaks only of estates of inheritance for life or years, 3 Cruise, 378, Tit. 32, Ch. 22, §§ 38, 49; *Chapman v. Emery*, Cowp. 280. The term purchase, is of very extensive significa-

tion, and comprehends every species of acquisition in contradistinction to hereditary descent and escheat, Co. Litt. § 12. In equity a purchaser is considered as a person, who without fraud, and for valuable consideration, acquires a right or interest, and is, therefore, so far favored, that his title shall not be impeached in equity, 1 Eq. Ca. Ab. 353, A, and the cases there cited. I think the terms of the Act may be satisfied by including mortgagees within the word purchasers. Although the popular understanding is, a purchaser in fee, the reason and spirit of the Act protect mortgagees, as well as subsequent judgment creditors. The former are equally within the mischief intended to be remedied.

This being the construction of the Act, it seems to follow, that notice of such a judgment cannot prejudice the respondent's rights; for it is only notice of a judgment declared by the Act to be fraudulent, and consequently not obligatory on the respondent.

But it is contended that the respondent did not purchase *bona fide*, because he had notice of the appellant's judgment, and the case of *Dunham v. Dey*, 15 John. 568, is supposed to support this doctrine. There is, however, a manifest distinction. In that case, it was decided that a person who takes a conveyance of land, with notice of a prior unregistered mortgage, is not a *bona fide* purchaser, who can gain a priority by having his deed first recorded. Now the unregistered mortgage was a valid security. It had every essential of a just demand between the parties. It could only be defeated by an omission to register, if a purchaser intervened. But notice, in such a case, supersedes registry. The object intended by the statute, which is to apprise the purchaser, is attained. The unregistered mortgage is not declared fraudulent, but shall be postponed.

The statute relating to specifications had other objects in view. Numerous frauds had been committed by entry of judgments on bonds and warrants for fictitious demands. To detect the fraud was a principal object, by requiring a minute statement, which would enable the purchaser, or subsequent judgment creditor, to unravel the fraud. If this was not filed, it was then adjudged fraudulent. The creditor might disregard it. He had a right to consider it fraudulent. If notice of such a judgment is a substitute, the statute is a nullity. Apply the doctrine to a subsequent *bona fide* judgment creditor. He has notice of the first judgment, but the other essential is wanting—a good specification. The judgment, then, cannot strengthen the appellant's claim.

He must rest on his assignment, which, in the view I have taken, is amply sufficient.

It has been contended, that if the appellant took nothing as assignee of the mortgage, by reason of the merger, then he is entitled to the premises, under the words granting the same to him, his heirs, and assigns forever. This ground, I think, would be tenable, if the granting words were not restricted in their operation; but the *habendum* is, "to hold the same as fully as the mortgagee might hold and enjoy the same by virtue of the mortgage and bond accompanying the same." These expressions unequivocally show that no right or title was granted, but such as might be acquired by the assignment of a subsisting mortgage.

If it be admitted that the respondent is entitled to the prior lien, then I am of opinion the decree is erroneous, in allowing the respondent to be satisfied out of the mortgaged premises, to the whole extent of the balance due him. His conveyance was solely a security for a note of \$5000, and a bond executed with Wattles to Amos P. Granger.

The first objection to this allowance is, it no where appears that Wattles ever assented that the mortgage should secure any thing beyond the specific objects for which it was given. The assignment of the partnership goods to the respondent was subsequently taken as a collateral security. There is no proof that advances were made on the credit of the original security. A mortgage made to secure against future as well as present responsibilities is undoubtedly good. In some cases, a subject pledged for a debt may be considered as a security for further loans. The cases referred to by his Honor the Chancellor, in *Hendricks v. Robinson*, 2 John. Ch. Rep. 309, do not support the right claimed by the respondent. In *Shirras v. Craig*, 7 Cranch, 34, the mortgage was executed, in part, to secure the payment of money actually due at the time, and in part to secure sums *to be advanced*. So, in *The United States v. Hooe*, 3 Cranch, 73, the mortgage was to secure against existing and future responsibilities. The attempt here is, without any understanding or agreement, to hold the mortgaged premises charged for a general balance. It is highly probable, from the testimony, that on an account taken (after first applying partnership property to the payment of partnership debts) a sufficient sum will remain out of the merchandise and other articles assigned as a collateral security with the mortgage, to pay off and discharge the note of \$5000, and the responsibility incurred by the bond to Granger.

The rule laid down in *Jones v. Smith*, 2 Ves. Jun. 376, is, that a mortgagee cannot tack a bond against the mortgagor, nor against creditors, but may against the heir, to prevent circuity of action. But if the heir assign the equity of redemption, the assignee who brings his bill to redeem, shall pay the mortgage only, and not the bond, 1 P. Wms. 776. In *Louthian v. Hasel*, 3 Brown's Ch. Rep. 162, it was held that a mortgagee, having also a bond, cannot tack it against other specialty creditors, though he may against the heir. Lord THURLOW observes, "in natural justice the right has no foundation ; the creditor having another special security, cannot give him, in justice, any priority ; it has not been done in any case, but that of the heir, and merely to prevent circuity." So in *Hamerton v. Rogers*, 1 Ves. Jun. 513, a bill of foreclosure was dismissed with costs, so far as it sought to tack a bond to a mortgage against creditors. To these may be added the case *Ex parte Hooper*, 1 Mer. 7, where a mortgage was held no security for subsequent advances made on the strength of a parol engagement.

These cases conclusively show that the respondent cannot divert the securities taken from the objects specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, and particularly when an objection is interposed by a *bona fide* creditor holding a judgment made valid by an amended specification.

But even admitting that the respondent may apply the fund to satisfy advances not contemplated when the mortgage was given, the doctrine will not allow such application after the 21st August, 1819, when the amended specification was filed, from which time the judgment became operative, against subsequent judgment creditors and purchasers, and became a lien on the mortgaged premises. If the respondent is allowed for advances between the 14th June and 21st August, 1819, I apprehend the allowance must stop there. The appellant's right then became perfect, to require that the fund then remaining be exclusively applied to discharge the note and bond of indemnity. After that day the respondent had no power to disregard the appellant's judgment. This point is not noticed by the Chancellor. As its correctness cannot, I think, be well questioned, I presume it was overlooked ; otherwise it would probably have produced a modification of the decree.

My conclusion, then, is, that the appellant is entitled to hold the mortgaged premises under the assignment for the demand therein specified, on the ground, that there was no merger, and consequently

that the mortgage was a valid security. But secondly, if it were otherwise, then I am of opinion that all the property received by the respondent, under the assignment made by Wattles, subsequent to the mortgage, be applied, if necessary, in discharge of the note of \$5000, and the bond of indemnity, after first satisfying partnership debts due on the 14th June, 1819; and that the mortgage premises be holden by the respondent as charged with the balance only, if any, after making such appropriation; it being the clear intention of the parties, that the fund should, in the first instance, be exclusively applied in this manner. If, however, it be decided that the securities cover subsequent advances, they ought only to include such as were made between the 14th June and 21st August, 1819, when the appellant's judgment becoming effectual, interposed a legal and equitable barrier against a further allowance.

I am of opinion that the decree of his Honor the Chancellor be reversed.

SUTHERLAND, J.—The great question in this case is, whether the mortgage given by Caleb Johnson to James O. Wattles, on the 24th day of June, 1817, and which was assigned by Wattles to William James, the appellant, on the 9th day of November, 1818, was, at the time of such assignment, an unsatisfied and subsisting mortgage. For, although many other topics are presented by the case, and were elaborately and ably discussed by the learned counsel who argued it, a diligent examination has satisfied me that the question of merger must control the decision of this court.

The facts out of which this question arises are briefly these: One Caleb Johnson, being indebted to James O. Wattles in the sum of \$12,000, for the purpose of securing that sum executed to him, on the 24th June, 1817, a bond, together with a mortgage on certain lots and buildings in the village of Onondaga. The mortgage was duly registered on the 17th day of July thereafter. On the 20th day of April, 1818, all the right and title of Caleb Johnson to the mortgaged premises were sold by the sheriff of Onondaga, under several executions upon judgments against Johnson, obtained in the Onondaga Common Pleas. The premises were sold in two parcels. The first under a judgment in favor of Wattles for \$2000—of which William H. Sabin became the purchaser, for the sum of \$205; the residue, under four

other judgments in favor of different persons, of which residue James O. Wattles became the purchaser for the sum of \$440. Conveyances were, on the same day, executed by the sheriff to Sabin and Wattles for the parcels thus purchased by them respectively. All the judgments were subsequent to the mortgage. Nothing passed, therefore, by the sale and conveyances of the sheriff, but Johnson's equity of redemption in the mortgaged premises.

Wattles being thus the owner of a mortgage on the whole of the premises, and of the equity of redemption in a portion of them, became indebted to William James, the appellant, in the sum of \$9331; and for the purpose of affording to him additional *collateral security*, on the 9th day of November, 1818, assigned to him the bond and mortgage in question, covenanting in the assignment, that the sum of \$12,000 remained due. On the 26th day of May, 1819, Sabin conveyed to Wattles all his estate and interest in the mortgaged premises; and on the 21st day of July thereafter, Wattles conveyed the whole of the premises to the respondent, Davenport Morey, by way of security against certain responsibilities incurred by Morey for him. The deed bore date on the 14th June, 1819, and though absolute in terms, is admitted to have been given by way of security or mortgage only. It was recorded, as a deed, on the 13th day of January, 1821.

The respondent, Morey, expressly denies in his answer any notice or knowledge of the assignment of the mortgage from Wattles to James, until the fall of the year 1820, and there is no evidence in the case to falsify or impeach this denial. I shall, therefore, consider him in the discussion of this point, at least, a *bona fide* mortgagee, standing in equal equity with the appellant, entitled to contest with him, and, if he can, to impeach upon principles either of law or equity, the validity of his prior incumbrance.

It is contended, on the part of the respondent, that admitting the mortgage to have been a subsisting security at the time of its assignment to the appellant, he having neglected to record the assignment, cannot set up the mortgage as against the respondent, who had no notice of its assignment, when he took his conveyance of the 14th June, 1819.

If this proposition can be sustained, it must be, I apprehend, upon one of two grounds—either that the assignment of the mortgage was required, by law, to be recorded, or that the respondent stands in the place of the mortgagor, and is entitled to have all the equities subsisting

between him and the mortgagee, at the time when he received notice of the assignment, adjusted and satisfied, before the assignment can take effect.

It was admitted upon the assignment, that the Registering Act of January, 1794, in relation to military bounty lands, has no application to this case; the premises in question being in the Onondaga reservation, and that reservation being no part of the military bounty lands. And there was no other Act requiring deeds, in relation to lands in the Onondaga reservation, to be recorded, until the Act of March 23, 1821, which applied to conveyances only, made after the 1st of July following.

At the time, therefore, when the appellant became the assignee of the mortgage, there was no law requiring him to record the assignment. If he had caused it to be recorded it would have been a voluntary and ineffectual act. In judgment of law, it would have been notice to no one, *Bushell v. Bushell*, 1 Sch. & Lef. 103; *Latouche v. Dunsany*, Id. 157; *Underwood v. Ld. Courtown*, 2 Id. 64; *Morecock v. Dickens*, Ambl. 678. Not to the mortgagor, because he is entitled to actual notice, and would not be affected with the constructive notice resulting from a registry of the assignment, even if it was required by law to be registered. Not to a subsequent grantee or mortgagee, because the law will not intend that to be known, for the existence of which there is no legal necessity. No presumption can be indulged, that if the assignment had been recorded, the respondent would have become apprised of the fact. He was not bound to examine the records. It is not, therefore, to be supposed that he would examine them.

The rights of the appellant, therefore, are not affected by the circumstance of his not having recorded the assignment of the mortgage.

There is no doubt of the position, that the assignee of a mortgage takes it subject to the equities which may exist between the mortgagor and the mortgagee, or which may accrue at any time before notice of the assignment is brought home to the mortgagor, *Matthews v. Wallwyn*, 4 Ves. Jr. 118; *Williams v. Sorrell*, 4 Id. 389. But this principle, I apprehend, is confined to transactions between the mortgagor and the mortgagee, and from the very nature of things is inapplicable to dealings between the mortgagee and third persons.

If I have been successful in showing that the assignee is not bound to record the assignment, and that a voluntary registry would not be constructive notice to any person, then it necessarily follows, that what-

ever notice is required to be given must be actual and not constructive; for I know of no other act which it can be supposed the assignee was bound to perform, from which notice could be inferred, except the act of registering. Now it is utterly impossible for the assignee of a mortgage to know with whom the mortgagee may subsequently deal in relation to the mortgaged premises.

Take the case before the court. How was the appellant to know, on the 9th day of November, 1818, when he took his assignment, that Wattles, on the 24th day of June, 1819, would convey the mortgaged premises to the respondent. If he had no means of knowing that he was, or was to become, interested in the subject matter of the assignment, how could he give him notice that he was the proprietor of the mortgage.

The case of *Williams v. Sorrell*, 4 Ves. 389, which the Chancellor cites in support of the broad position, "that all dealings with the mortgagee, before notice of the assignment, are valid," was a case between the mortgagor and the assignee of the mortgagee, and the simple question was, whether, after an assignment of the mortgage, payments made by the mortgagor to the mortgagee, without actual notice of the assignment, were to be allowed. It was held that they were, although the assignment had been registered. The same principle was settled in *Matthews v. Wallwyn*, 4 Ves. 118, and, I am persuaded, there is not a case to be found in which the principle has been applied to dealings between the mortgagee and third persons. Vid. *Clute v. Robison*, 2 John. Rep. 595.

Indeed, the Chancellor has most clearly recognized and enforced the distinction in the cases of *Murray v. Lylburn*, 2 John. Ch. Rep. 441; and *Livingston v. Dean*, Id. 479. In the first case he says: "It is a general and well settled principle, that the assignee of a chose in action takes it subject to the same equity it was subject to in the hands of the assignor. *But this rule is generally understood to mean the equity residing in the original obligor or debtor*, and not an equity residing in some third person against the assignee. The assignee can always go to the debtor, and ascertain what claims he may have against the bond or other chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the claim of the assignee,

without notice, of a chose in action, was preferred in the late case of *Redfearn v. Ferrier and others*, 1 Dow. Rep. 50, to that of a third party setting up a secret equity against the assignor. Lord ELDON observed, in that case, that if it were not to be so, no assignment could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchasers, or assignments *by contract*." In *Livingston v. Dean*, the Chancellor remarks, "Though the assignee of a bond and mortgage takes it subject to all the equity of the *mortgagor*, yet as to the latent equity of a third person against the mortgagee, as possessor of the mortgage, the case is different. The assignee does not take the mortgage subject to such an equity, unless he has notice of it expressly or constructively."

Admitting, therefore, that the equity of the respondent, whatever it may be as it respects the mortgagee, had existed at the time of the assignment of the mortgage to the appellant, instead of being bound to give notice of the assignment to the respondent, the appellant would have held the mortgage discharged from the respondent's equity, unless he had personal notice of it.

But it is said that the appellant suffered Wattles to remain in possession of the mortgaged premises after the assignment, claiming as owner, whereby he enabled him to perpetrate a fraud by dealing with the property as his own.

The possession of Wattles was consistent with the claim of the appellant. He claimed only as mortgagee. Wattles was in fact the mortgagor, and according to the established usage of the country, was permitted to retain possession.

The rule, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have, *Taylor v. Stibbert*, 2 Ves. 437, *Hiern v. Mill*, 13 Id. 118, *Hall v. Smith*, 14 Ves. 426, *Daniels v. Davison*, 16 Id. 249, and all the consequences which flow from it, are applicable to this case. No such tenant, nor any one claiming under him, contest the rights of the appellant. If Morey was in possession at the time of the assignment to the appellant, it was as tenant to Wattles, either at will, or from year to year; and not as pretending to claim any right of property in the premises. Whatever his rights were, they all accrued subsequent to the assignment. But Morey was not, at that time, in possession. I shall have occasion hereafter to show, that he did not go into possession

until December, 1818, at the shortest, and probably not until still later. Johnson, then, the mortgagor, was still in possession. Does he, or any one claiming under him, attempt to impeach the equity of the appellant?

I have already said, that the possession of Wattles, after the assignment, was consistent with it; and if he pretended to be the absolute owner of the property, the law will not charge the appellant with knowledge of such claim; nor can he be held responsible for the consequences which may result from it, however fraudulent they may be, unless he is made a party to the fraud, by proof that he knew that Wattles claimed to have the absolute estate, and, after such knowledge, still left him in possession. Whether knowledge of such claim would make him a party to the fraud, it is not necessary to inquire; for there is not the least evidence in the case to affect him with such knowledge.

*I am, therefore, clearly of opinion, that the appellant has not forfeited, by any act, either of omission or commission, any right acquired by him under the assignment of November 9, 1818.

It remains, then, to inquire into the nature and extent of the interest which passed by that assignment. Wattles, at the time of the assignment, had the legal estate as mortgagee in the whole of the mortgaged premises, and the equitable interest of the mortgagor in about two-thirds, under the purchase made by him, at the sheriff's sale, on the 20th April, 1818. The equity of redemption in the remaining third being in Wm. H. Sabin.

It is contended on the part of the respondent, that by the union of the legal and equitable estates in Wattles, the mortgage became extinguished, at least to the extent in which that union had taken place; that if the mortgage subsisted for any purpose after that union, it was only as an incumbrance upon that portion in which Sabin had the equity of redemption. The assignment to the appellant, therefore, it is contended, passed no interest in the residue.

A merger, at law, is defined to be "where a greater estate and a less, coincide and meet in one and the same person, in one and the same right, without any intermediate estate." The less estate is immediately annihilated, or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to, or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more," 2 Blackst. Com. 177.

The rule in equity is the same as at law, with this modification, that at law it is invariable and inflexible. In equity it is controlled by the expressed or implied intention of the party in whom the interest or estates unite. *Compton v. Oxenden*, 4 Brown Ch. Cas. 403. 2 Vesey, Jun. 264. *Forbes v. Moffatt*, 18 Vesey, 384. *Wade v. Paget*, 1 Brown Chan. Cas. 368. *Gardner v. Astor*, 3 John. Ch. Rep. 53.

It was argued for the appellant, that the doctrine of merger is not applicable to this case, because the whole legal and equitable estates, *in the whole subject-matter of the mortgage*, were never united in the same person. It is obvious that there was no merger as to that portion of the mortgaged premises, in which Sabin acquired an equitable interest, because he had no legal estate into which his equitable interest could sink. But I have been unable to realize the weight of the considerations which were drawn from this circumstance against a merger as to the residue.

The whole legal and equitable estates must unite or there can be no merger. BLACKSTONE says, (2 Com. 103), "an estate in lands, tenements, and hereditaments, signifies *such interest* as the tenant hath therein." The estate of Wattles, in the mortgaged premises, was his *legal* interest in each and every portion of them. The estate of Johnson in the same premises, was his *equitable* interest in each and every portion of them. When Wattles, therefore, became the purchaser of Johnson's equitable interest in two-thirds of the premises, the whole legal and equitable estates in those two-thirds were united in him; and I can perceive no reasons why that might not have been a merger *pro tanto*.

Wiscot's Case, (2 Co. Rep. 61) is a direct authority for the doctrine, that a portion of a particular estate may be merged without the residue. It is there said, "if the reversion be granted to tenant for life, and another in fee, the estate for life is extinct for a moiety; for tenant for life cannot purchase or get the reversion or remainder of the same land, but the estate for life will be merged, *having regard to the estate which he hath gotten in the reversion.*" That is, there shall be a merger so far as the particular and residuary estates unite. The tenant in that case having the whole of the estate for life, and a moiety of the reversion, only a moiety of the estate for life merged; leaving him with an absolute estate in one, an estate for life in the residue, reversion in fee in the stranger. This is a case precisely analagous in principle to the one before the court.

To say that after a merger has taken place there can be no foreclosure of the mortgage, nor any action upon the bond, and that therefore there can be no merger of a part of the mortgaged premises, is begging the question. There can, strictly speaking, perhaps be no foreclosure as to that portion in relation to which a merger has taken place, because the fact of merger presupposes the annihilation of the equity of redemption, which is the only object and effect of a strict foreclosure. But what is to prevent a foreclosure as to the residue? It cannot be questioned that there may be a foreclosure as to one portion of mortgaged premises and not as to the residue. It is the uniform practice of a Court of Chancery to prevent a sale of the whole mortgaged property, where it is made to appear that a portion of it will produce a fund sufficient to pay the mortgage debt; and where it is obvious that it would be either useless or inequitable for the foreclosure to embrace the whole mortgaged premises, there can be no doubt of the authority or the disposition of a Court of Equity to restrict it to a particular portion.

The only difficulty, which it appears to me can possibly arise, is as to the apportionment of the debt; and under the ample discretion which Courts of Equity exercise in relation to mortgage securities, I am persuaded that the difficulty from this source would not be found formidable. All the parties in interest are necessarily brought before the court. The rights of all are disclosed, and the decree is moulded according to the exigencies of the various and complicated equities of the case. This plastic power of a Court of Equity has never been exercised with more vigor or benignity, than in the Chancery of this State. The case of *Tice v. Annin*, 2 John. Ch. Rep. 125 is but one of many illustrations which might be produced of the truth of this remark.

The same observations are applicable to the difficulty which, it is alleged, would be found in fixing the measure of recovery, in any suit which might be instituted upon the bond, for the balance remaining due after the merger.

I am, therefore, of opinion, that a merger in relation to that portion of the mortgaged premises, the legal and equitable titles in which were united in Wattles, would not be prevented by the fact, that no such union had taken place as to the residue.

It remains, then, to inquire whether there was a merger of any portion of the premises; and this will depend entirely upon the inten-

tion of Wattles, either expressed or implied, that there should or should not be a merger.

The rule upon this subject is perspicuously stated by the Master of the Rolls, Sir William Grant, in *Forbes v. Moffatt*, 18 Ves. 389. He says, "it is very clear, that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he choose, at once take the estate and keep up the charge. Upon this subject, a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law, and sometimes preserved it where, at law, it would be merged. *The question is upon the intention, actual or presumed, of the person in whom the interests are united.* In most instances, it is with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot." The same general doctrine is laid down and acknowledged in all the cases, *Lord Compton v. Oxenden*, 2 Ves. Jun. 263. 4 Br. Ch. Cas. 398, S. C. *Thomas v. Kemeys*, 2 Vern. 348. *Gardner v. Astor*, 3 John. Ch. Rep. 53. *Mills v. Comstock*, 5 Id. 214. *Starr v. Ellis*, 6 Id. 393. 2 Fonbl. 162, Ch. 6, § 8.

One consideration, therefore, is, whether Wattles has done any thing to determine that election which he undoubtedly had. If not, the question will be upon the presumption of law under the circumstances of the case.

The first point to be settled under this head of inquiry is, within what period was Wattles bound to make his election whether the equitable and legal estates should remain distinct or become united in his hands; for, until this is determined, we know not what acts or declarations of his are to be taken into consideration. If he was bound to make his election within a given time, six months for instance, then we have only to examine whether, within that period, he did any thing that determined the election. If not, then we resort to the presumption of law which arises upon the case; and that presumption must control, although it be repelled and contradicted by the clearest and most unequivocal manifestation of his intention, subsequent to the lapse of the given time.

Most of the English cases have been decided upon the presumed intention of the party, there being no evidence of his actual intention. Thus, the case of *Ld. Compton v. Oxenden*, 4 Br. Ch. Cas. 398, was one

of a lunatic, who was incapable of expressing any intention. So also of *Ex parte Grimstone*, Ambl. 706, and *Powell v. Morgan*, 2 Vern. 90, *Thomas v. Kemeys*, Id. 348, and *Lawrence v. Blatchford*, Id. 457, were cases of infancy. An intention in the two first cases, (*Powell v. Morgan*, and *Thomas v. Kemeys*), had been expressed, it is true, by the making of wills, but the Ld. Chancellor, in *Lord Compton v. Oxenden*, says, "the cases of infants turn upon a supposed intent. The court saw, in *Thomas v. Kemeys*, that it was much more beneficial for the infant that the interest should continue personal."

But in *Forbes v. Moffatt*, 18 Ves. Jun. 389, the acts of the party were considered and examined for a series of years, and up to the time of his death, for some evidence of his intention as to the continuance or merger of the charge; and no act of his having been found, which was decisive upon the point, the case turned upon the legal presumption of his intention, that the charge should not merge, because it was for his interest that it should not. No resort was had to legal presumption of his intent, until the whole period between the time when the estates united and the death of the party (which was ten years) had been searched in vain for some conclusive evidence of his actual intention.

In *Gardner v. Astor*, 3 John. Ch. Rep. 53, more than three years had elapsed after the union of the legal and equitable estates, before the mortgage was assigned. It was heard upon bill and answer: of course there was no proof in the case, and no act appeared to have been done by Winter, between the time when the two estates came into his hands, and the time when he assigned the mortgage to Gardner. But the Chancellor appears to have put his decree upon the ground that the assignment was in fact made subsequent to the conveyance to the defendant Astor; it not having been acknowledged until after that period, Astor swearing that he believed it was not made until after the conveyance to him, and there being no proof to show, as the Chancellor remarks, when it was actually made.

The case of *Mills v. Comstock*, 5 John. Ch. Rep. 214, was decided upon its own peculiar circumstances, and the question of election did not there arise. The Chancellor put his decree, upon the ground that the assignment of the mortgage to Comstock was a deed or conveyance within the meaning of the registering Act of January 8, 1794, and not having been registered, was fraudulent and void as against Mills, who was a subsequent purchaser for valuable consideration. The assign-

ment being void, the mortgage was to be considered still in the hands of Herrick, and the deed from him to Mills, being the first act of his which legally affected the transaction, must necessarily be considered as conclusive evidence of an election on his part, that the two estates should unite; because that deed purported to convey an estate which it could not convey unless a merger had taken place. But, as I have already remarked, the Chancellor put it upon the ground of fraud.

In *Starr v. Ellis*, 6 John. Ch. Rep. 393, the Chancellor does say, "that unless some beneficial interest be shown to require the charge to be kept up, or the intention to keep up the charge be immediately and duly declared, it shall merge." Upon an examination of that case, it will be found that the assignment of the mortgage was from a father to his son. The bill alleges the assignment to have been fraudulent. The son appears not to have answered. The father, it is true, denies the fraud, and says the assignment was made in satisfaction of a debt due from him to his son. The proofs taken in the cause are not stated. What they must have been may be inferred from the language of the Chancellor. He says, "the facts warrant the charge of a fraudulent combination between the two defendants to set up the mortgage to the prejudice of the plaintiff's title, which he purchased of the defendant, Samuel Ellis. The credit of the answer of Samuel Ellis is very much shaken by the proofs against the truth of some of its averments, and I am entirely satisfied, that the mortgage has been fraudulently assigned, and set on foot to injure the plaintiff's title. *The assignment to the son, if even before the plaintiff's purchase, was colorable only. The marks of fraud are upon every part of this transaction.*"

It will be perceived, then, that in the opinion of the Chancellor, this was a case of actual gross and glaring fraud; that the assignment *was colorable only*; and (admitting the mortgage to have been a subsisting security) would have been void, not only against a *bona fide purchaser*, but even against the *creditors* of the father. The question of *merger* did not, therefore, necessarily arise in the cause; for whatever might have been the opinion of the Chancellor upon that point, the assignment must have been declared void on the ground of fraud. The observation of the Chancellor, therefore, "*that the intention to keep up the charge must be immediately declared,*" comes to us with a diminished weight of authority. He must have perceived that the question of fraud controlled the case, and perceiving that, it is not disrespectful to

him to suppose, that he gave to the other features of the case a consideration less laborious and profound than he would otherwise have done. In questioning the correctness of that position, therefore, I consider myself as combating the *impressions merely*, and not the *authority* of the Chancellor. But there was, in truth, in that case, a lapse of 14 months between the purchase of the mortgage by Samuel Ellis and the assignment to his son. And if the case had turned upon the question of merger, all that would have been decided by it is, that if the party in whom the legal and equitable estates unite, does not, within 14 months, declare his intention that they shall or shall not remain distinct, the law will presume his intention from the circumstances of the case. To establish the rule that the intention of the party shall be immediately declared, or the law shall declare it for him, would be virtually to take from him the privilege of election. How is he to make his intention known, except by his acts in relation to the property which is the subject of the charge? Is not a reasonable time, then, to be allowed him? Is he to be compelled immediately to assign the charge, if he intends to keep it distinct? or to sell the fee, if he intends the charge shall merge?

If the law gives him the privilege of election, it will give him a reasonable time within which to make it. This appears to me to be the good sense of the rule; and it is clearly sanctioned by the authorities to which I have adverted—particularly by the case of *Forbes v. Moffatt*.

What is to be considered a reasonable time, must depend, in some degree, upon the circumstances of each case, upon the nature of the charge, the situation of the property, and the circumstances of the individual.

Let us, then, inquire whether Wattles, within a reasonable time after he became the purchaser of the equity of redemption, did any thing which clearly manifested his intention that it should or should not merge in the legal estate. The circumstances relied upon to show that Wattles considered the mortgage as merged, and so intended, are, that after the sheriff's sale, he entered into possession of the premises—that he repeatedly declared the whole title to the Johnson property (except the interest acquired by Sabin at the sheriff's sale) was in him—that he offered to sell it, and said he would give a clear title.

It does not appear that Wattles, himself, ever entered into the actual possession of the property. Johnson, the mortgagor, continued in the

house until the spring of 1819—that is, for a year after the sale—and Morey, the respondent, took possession of the residue, under some agreement with Wattles, either in the fall of 1818, or the succeeding winter. Reuben West says he entered in December, 1818. Thaddeus M. Wood says the latter part of the year 1818. Wm. Clark says in November or December, 1818. Azariah Smith says in the winter of 1818 and 1819. The witnesses all speak of the whole mortgaged premises; for the 15th interrogatory, to which these answers are responsive, asks when D. Morey went into possession of the premises contained in the deed marked B. Now the deed marked B is the deed of the 14th June, 1819, from Wattles to D. Morey, for the whole of the mortgaged premises. The entry, therefore, of Morey, as the agent or tenant of Wattles, extended not only to that portion, the equity of redemption in which had been purchased by Wattles, but also to that, the equity of redemption in which had been purchased by Sabin. The entry and possession were precisely the same in relation to both portions.

The question then is, in what character did he enter—as mortgagee or absolute owner? I answer, as to Sabin's portion, he must have entered as *mortgagee*, because he had no right to enter in any other character. The inference, then, is irresistible, that he entered into the whole as mortgagee and mortgagee only. As far, therefore, as the taking possession of the mortgaged premises affords any evidence of Wattles's intention, it is that he meant to keep the legal and equitable estates distinct.

Sylvanus Tousley, Thomas I. Gilbert, and Hezekiah L. Granger, all swear, that in the summer of 1818, Wattles claimed to have a complete and perfect title to the Johnson property, and a right to sell and dispose of it, (except Sabin's portion); and so he most unquestionably had. He had the legal estate by his mortgage, and the equitable by purchase; and he had the power of uniting them whenever he pleased. But does the assertion of that fact afford any evidence of a present subsisting intention to unite them? Clearly not. It is well remarked by the Master of the Rolls, in *Forbes v. Moffatt*, "that the owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make, is not whether he will take the estate or the charge, but whether, taking the estate, he means the charge to sink into it, or to continue distinct from it." I lay out of the case all the declarations which Wattles is said to have made, that he had a deed for the property from Johnson. They are clearly incompetent

evidence, as against the appellant, of the existence of the deed. Nor do they, in my judgment, afford the slightest evidence upon the point now under discussion.

The assignment of the mortgage from Wattles to James, is the next event in the order of time; and, indeed, it was anterior to the possession of the mortgaged premises taken by Morey. The balance of evidence is, that Morey did not enter until December, 1818. The assignment was on the 9th of November preceding. It was entitled, therefore, to be first considered in determining the intent of Wattles.

I apprehend there can be no difference of opinion, as to the decisive evidence which this assignment affords of Wattles's intention to keep the charge distinct from the legal estate. It contained a solemn covenant, that the bond and mortgage were a subsisting security, and that the sum of \$12,000 was then due upon it. It was the first act, on the part of Wattles, after the union of the two estates in his hands, which affords any evidence of his intention whether they should be kept distinct or not. It was within six months and a half after he acquired the charge, which I cannot consider an unreasonable time to allow him for making his election. It affords, then, in my judgment, competent and conclusive evidence of the *actual intention* of Wattles that there should be no merger, and precludes all inquiry into the presumption of intent which the law, in the absence of such evidence, might have inferred from the facts in the case.

When the assignment was made, there were no claims or rights in conflict with it. Nothing had been done by Wattles to render it unjust or inequitable to keep the estates distinct, in conformity with his declared wish and intention. No man had dealt with him upon the legal presumption of merger, and no one had a right to question or impeach the transaction between him and the appellant. That the demand of the appellant, for which he took the assignment of the mortgage as security, was just and equitable, as against Wattles, has not been, and cannot be denied. He received for it a full and fair consideration, and unless he has forfeited the rights thus acquired, by his subsequent acts, he is entitled to a full and unconditional enjoyment of them.

I have endeavored to show that the appellant has done every thing which he was bound by law to do. Let us inquire, for one moment, whether the respondent, in dealing with Wattles, exercised the caution which, as a prudent man, he ought to have done. It was a matter of

public notoriety, that Wattles had a mortgage upon the Johnson property. It was also matter of record, for the mortgage was registered. The respondent had legal, and undoubtedly actual knowledge of the fact. When he took his conveyance, therefore, on the 14th of June, 1819, he knew that Wattles's title to the property conveyed originated in a mortgage. He knew, then, that the mortgage was one of the title deeds to the estate. If he knew of the purchase of the equity of redemption by Wattles, he also knew, in judgment of law, that it was in the power of Wattles still to keep the equitable and legal estates distinct. He knew that an assignment of the mortgage by Wattles, immediately, or within a reasonable time after the purchase of the equity of redemption, would determine his election, and pass the legal estate to his assignee. He knew that the possession of the title deeds, if not indispensable, is a measure of prudent precaution on the part of the purchaser; for he took from Wattles the deeds from the sheriff and Sabin to him. Did he then act with the proper caution, not only in omitting to demand the mortgage, as one of the title deeds, but in omitting to make any inquiry concerning it. If he had asked for the mortgage, and its delivery had been evaded or refused, it would have excited suspicion and inquiry, which would have led to a discovery of the assignment. To whom, then, is negligence imputable, and who has trusted most?

The Chancellor says, "The assignee has no right to complain. *He dealt with a suspicious instrument, that ought to have put him upon inquiry.* He knew, or was bound to know, for it was matter of record, that Wattles had purchased in the equity to at least three-fourths of the premises. Why did he not record the assignment, and why did he not take a new mortgage? The answer to most of these inquiries is to be found in the considerations which I have already submitted. James had no actual knowledge of the purchase by Wattles. The recording of the sheriff's deed was not notice to him, in judgment of law; for, by law, it was not necessary to record it. He did not record his assignment for the same reason. He may not have taken a new mortgage, because he did not know that Wattles had it in his power to give one: or, if he did know it, he understood that a new mortgage could cover but three-fourths of the premises; and he may have taken the assignment, because he preferred security upon the whole to security upon a portion of the premises. The instrument with which he dealt *may have*

been a suspicious one, though, I must confess, I have been unable to discover what rendered it so.

But concede the fact, that here was sufficient to put James upon inquiry, and that he did inquire; what discovery could the most diligent investigation have made, which would have warned him against taking the assignment? He would have learned that the legal and equitable estates were both in Wattles—that he had done no act which evinced an intention, on his part, that the former should merge in the latter—that he had neither parted with, nor incumbered either—and that there was no living being whose rights or interests would be, in the remotest degree, affected by his determination to unite or to preserve the two estates distinct. If he had asked the respondent whether he had any interest in the question, he would have learned that he had not. The most diligent inquiry would, therefore, have resulted in a conviction, on the part of the appellant, that there was no legal or equitable objection to his taking the assignment. *His right, therefore, is not only first in point of time, but it is supported by the better equity.* I am, accordingly, of opinion, that the decree of his Honor the Chancellor should be reversed.

It will be perceived, that the view which I have taken of the case, has rendered it unnecessary for me to consider whether the appellant's judgment was valid, as against the respondent's mortgage, or not; though I should be inclined to the opinion, that it was not, upon the authority of *Lawless v. Hackett*; (16 John. 149) and *Brinkerhoff v. Marvin*, (5 John. Ch. Rep. 320) without having given to the subject much consideration. An examination of the accounts between Wattles and Morey is also unnecessary; for, having come to the conclusion that the appellant's mortgage is first to be satisfied, the amount, for which the respondent's is to stand, must be perfectly immaterial to the appellant. If there should be any surplus, it may be matter of discussion between Wattles and Morey.

I have also omitted to consider, what interest Sabin acquired in the mortgaged premises, by his purchase at the sheriff's sale. Whether the equity of redemption merely, or the whole estate, in consequence of Wattles's silence as to his incumbrances; because, whatever he acquired passed to Wattles, by his subsequent release, and neither he nor his grantee can set up the fraud to bar the incumbrance of the appellant. If he acquired from Sabin any thing beyond the equity of redemption,

it enured to the benefit and confirmation of his deed of assignment to the appellant, and did not pass by his deed to the respondent. *Trevivan v. Lawrence et al.*, 1 Salk. 276, 2d res. *Palmer v. Elkins*, 2 Ld. Raym. 1550; *Jackson v. Bull*, 1 John. Cas. 90, per KENT, J.

SAVAGE, Ch. J.—(After stating the facts, substantially, as detailed by WOODWORTH and SUTHERLAND, Justices.)

The appellant seeks to foreclose the mortgage assigned to him, or to recover the money on his judgment against Wattles.

The respondent claims to hold the premises in pledge for the objects for which they were mortgaged, and also for a general balance due to him from Wattles.

To determine correctly the rights of the parties, it becomes important to ascertain those of Wattles on the 9th November, 1818.

The mortgage was given upon sufficient consideration, and there can be no doubt that the whole \$12,000, and more, were advanced by Wattles. It must then be still a subsisting incumbrance, unless it has become inoperative in consequence of the sheriff's sale of the 20th April, 1818. The sheriff sold the equity of redemption only. *Jackson v. Hull*, 10 John. 481. There is no pretence for alleging that the mortgagee, by his silence at the sale, forfeited his rights. His mortgage was registered, which was notice to all the world; and the judgments upon which the executions issued were younger than the mortgage. Two witnesses heard Wattles give notice of his claim; others, though present at the sale, did not hear this notice; but it is clear that the bidders knew of the mortgage, or they would not have suffered property worth 8 or 10,000 dollars to be sold for 645 dollars. That Sabin knew of the mortgage, is proved by his subsequently conveying to Wattles for a nominal consideration. Whether Wattles had a deed from Johnson, previous to the sale, I think very immaterial, as it must have been of later date than the judgments on which the sale was made. When, therefore, Sabin purchased one-fourth of the mortgaged premises, there can be no doubt that he had a good title to the equity of redemption for so much, whether Wattles had a previous deed or not. Sabin was the owner of this equity of redemption on the 9th November, 1818; and as to that part of the mortgaged premises there could be no merger. The mortgage was certainly valid *pro tanto*; and the appellant's right was complete before Sabin conveyed to Wattles, which was not till the

26th May, 1819. The doctrine of merger, as derived from the decisions in Great Britain and this State, seems to be this: that when the legal and equitable estates become united in the same person, the equitable is merged in the legal estate unless, 1. The party in whom they unite manifests an intention to keep them separate: or 2d, it is manifestly his interest to keep them so; but when it is indifferent whether they unite or not, or when an intention to unite them is shown, then they shall be united. In this case, it has not been shown that Wattles had any interest in keeping the two estates separate; and so far as his intentions are in evidence, from his declarations or his acts, previous to his assignment of the 9th November, they all go to prove a merger. His declarations that he owned the whole property, and his offers to sell, prove it.

In my opinion, therefore, the assignment of Johnson's mortgage, so far as the property purchased at the sheriff's sale by Wattles is concerned, can have no greater effect than that of an unregistered mortgage.

At the time when this mortgage was assigned, the appellant took a judgment, which is not impeached as to the fairness of the transactions between the parties; but a technical objection is raised, that the specification required by the statute, then in force, was insufficient. The decision in the case of *Lawless v. Hackett*, (16 John. 149,) is in point, and shows the objection to be well founded. In the view which I have taken of this subject, it does not become necessary to question the correctness of that decision. It may, however, be proper to remark, in passing, that the evil proposed to be remedied by the law of 1818, was the facility of committing frauds in entering up judgments by confession; as it was the practice, (whatever might be the real consideration) to state it to be money lent. The Legislature, therefore, required the nature and consideration of the debt to be stated in the specification; but when the court carried it so far as to require every item of the plaintiff's account to be specified, the Legislature seem to have considered the remedy worse than the disease, and, in 1821, repealed the Act.

As the objection to this specification is strictly technical, if it be considered tenable, a technical answer should be received. By the Act, a judgment without a specification, shall be adjudged fraudulent as it respects any other *bona fide judgment creditors*, "and every *bona fide purchaser for valuable consideration*, of any lands bound or affected by such judgment." The respondent is not a judgment creditor. He

is simply a *mortgagee*. He is not, therefore, technically a *purchaser*: (*Berry v. Mutual Insurance Company*, 2 John. Ch. Rep. 612;) nor do I think the Legislature, contemplated a mortgage creditor by the terms *bona fide purchaser for valuable consideration*. In the language of the Chancellor, in *Searing v. Brinkerhoff*, (5 John. Ch. Rep. 331,) "purchasers are there mentioned in contradistinction to creditors, and the word is used in the common and popular sense." "The Act ought not to be extended by construction; and the ordinary lien of the judgment creditor who might happen through the inadvertence, or the error of counsel, to omit as particular a specification as the Act required, ought not to be impaired, except in favor of those particular persons, who can bring themselves *clearly and strictly within the letter and within the meaning and policy* of the exception. In my judgment, it is no answer to say that a mortgagee comes within the reason and policy of the Act. The Legislature may have had wise reasons for excluding mortgagees from the benefits of this Act, as well as the Act authorizing the redemption of lands sold on execution, *Matter of Sanders Van Rensselaer v. Sheriff of Albany*, 1 Cowen's Rep. 501. It is sufficient for us that *ita lex scripta est*.

I am, therefore, clearly of opinion, that the appellant is entitled to the benefit of his judgment. It was a perfect lien as against the respondent. He admits, in his answer, that he knew of this judgment before the 14th June, 1819, and he did not know till January, 1821, that there was any objection to the specification. All his arrangements were made with Wattles, and his securities taken, under the expectation that the judgment was a lien upon the lands of Wattles, and to be satisfied in preference to his mortgage; and, in December, 1819, this judgment was the only obstacle in the way of an absolute purchase.

The result of my opinion on this part of the case is, that the plaintiff is entitled to the benefit of his judgment, and to his mortgage also, upon the fourth part of the premises purchased by Sabin at the sheriff's sale, on the 20th April, 1818.

As to the other three-fourths of the premises, the respondent, I think, is entitled to preference in the satisfaction of his mortgage, if any thing remains after the payment of James's judgment, unless his rights are affected by other circumstances in the case, constituting the equities of the parties. This part of the case, his Honor the Chancellor thought decidedly in favor of the respondent, and placed much reliance on the

fact, that the appellant had neglected to record his assignment. It was conceded on the argument, that the recording Acts, which relate to the military lands, have no application to the premises in question, they not being a part of those lands; and this concession destroys that part of the Chancellor's argument, which is predicated on the necessity of recording the assignment. I know of no law requiring the assignment of a mortgage to be recorded.

If notice of the assignment is not given to the mortgagor, he is protected in any payments he may make to the mortgagee. And this is the extent of the risk run by the assignee, who neglects to give notice of the assignment.

I have already stated, that I consider the appellant's assignment operative as to one-fourth of the premises, and as to the other three-fourths, it must be placed upon the footing of an unregistered mortgage. The respondent's mortgage was recorded as an absolute deed, but was never registered as a mortgage. They are both, therefore, unregistered mortgages, *Dey v. Dunham*, 2 John. Ch. Rep. 189. The second mortgage does not necessarily gain a preference unless registered; and not even then, if the second mortgagee has notice of the first mortgage. The rule, "*qui prior est tempore, potior est jure*," applies, unless the appellant has been guilty of fraud or culpable negligence, by leaving Wattles in possession of the mortgaged premises. Fraud is not imputed, and in point of negligence, the parties are equal. "It is a common rule (say the books), that when of two persons equally innocent, or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen; and here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right," *Berry v. Mutual Insurance Company*, 2 John. Ch. Rep. 603. It seems to me, therefore, that the appellant is entitled to preference as to the unregistered mortgage upon the three-fourths of the property purchased by Wattles at the sheriff's sale.

But even if the respondent's mortgage were to have preference, it could extend only to the objects for which the indemnity was given, to wit, the Auburn note, and the Wattles and Granger debts. As an additional security, Wattles assigned all his stock, etc., and some other personal property. The parties have presented very contradictory statements as to the amount of the security afforded by means of the personal property. Taking the accounts attached to the respondent's answer, it

appears that he had abundant security in this property. And as he knew of the appellant's judgment when he took that security, and did not then doubt its validity, he was most grossly negligent in omitting to indemnify himself.

On the whole case, therefore, I am of opinion, that the decree of his Honor, the Chancellor, should be reversed.

BOWNE, BURT, DUDLEY, GREEN, HATHAWAY, HUNTER, KING, LEFFERTS, MALLORY and REDFIELD, Senators, concurred in the result of the opinions delivered as above by the Judges.

CRAMER, Senator.—In this case, from the facts detailed in the pleadings and proofs, it appears that Johnson gave a bond and mortgage to Wattles, to secure the payment of \$12,000, dated the 24th day of June, and registered the 17th day of July, 1817. The mortgaged premises were sold on the 20th day of April, 1818, by virtue of executions on several judgments docketed subsequent to the execution of the mortgage. Wattles, the mortgagee, became the purchaser, at the sale, of three parcels of the premises, took a deed from the sheriff, and had it recorded on the 28th day of the same month. William H. Sabin purchased one parcel of the premises at the same sale, and Wattles, on the 9th day of November, 1818, assigned the mortgage of Johnson to the appellant, as security for a debt previously contracted by one Meeker, for \$9,331. Wattles, on the 14th day of June, 1819, for a valuable consideration, sold, in fee, the whole of the premises, covered by the Johnson mortgage, to the respondent. Prior to this conveyance, Wattles had purchased of Sabin all his right and title to the mortgaged premises. But this purchase was not made until after the assignment of the mortgage to the appellant.

This is a brief summary of the facts in the case, which I have deemed most material in forming a correct decision. Several other points were made, and all very ingeniously discussed by the counsel; yet, it appears to me, from the view I have taken of the subject, that the real merits are confined to very narrow limits, and depend entirely on the doctrine of merger, as recognized and settled in the Courts of Law and Equity in this country, and that from which we derive our system of jurisprudence.

I will here premise that I consider this case, from all which has been

presented to the Court, a fair contest between *bona fide* creditors to obtain securities for their respective debts or liabilities, from a debtor who was willing to defraud either of them.

I shall first, then, consider whether the legal and equitable estates had vested in Wattles under such circumstances that, in judgment of law, the mortgage was extinguished by merger as to those parts of the premises purchased by him at the sheriff's sale; and if so, secondly, whether that part purchased by Sabin, and quit-claimed to Wattles after the assignment, can, by any rule of law, be exempted from the operation of the Johnson mortgage in the possession of the respondent. From all the authorities which I have been able to examine, I consider the rule well settled, and I think it a rule founded upon good sense and justice, that when the legal and equitable claims are united in the same person, the equitable title is merged, and no longer exists except in special cases. In support of this position, the cases of *Gardner v. Astor*, 3 John. Ch. Rep. 53, *Mills v. Comstock*, 5 Id. 214, *Starr v. Ellis*, 6 Id. 309, and *Compton v. Oxenden*, 2 Ves. Jun. 261 are explicit and decisive.

The only exceptions to this rule are, first, when there is a declared intention on the part of the mortgagee that the equitable and legal titles shall continue distinct; secondly, where an intention to continue the mortgage may be fairly presumed from the acts of the mortgagee; and thirdly, where the law will presume such intention from the circumstances of the case, without regard to the acts of the mortgagee, which it will do in two cases: First, when for the interest of the party, the mortgage should continue; and secondly, when from the situation of the parties, (as in the case of an infant) he cannot make his election. These are all the cases to be found in which the mortgage will be deemed a subsisting incumbrance when the mortgagee has the legal and equitable estates united in himself. But when it is indifferent to the party, whether the charge should or should not subsist, it always merges. *Forbes v. Moffatt*, 18 Ves. 393. Do the facts detailed in this case bring it within any of the exceptions above mentioned? To me, it is obvious they do not.

The testimony taken in this case shows most conclusively, that there was no declared intention on the part of Wattles, that the mortgage should continue. All his acts and declarations before, at, and after the sale, manifest, most unequivocally, an intention on his part to unite the

*titles and to extinguish the mortgage; such as purchasing of Johnson the equity of redemption; his silence at the sale, and, after the sale, representing himself as absolute owner of the premises, and offering to sell them in fee. The fact of his silence at the sale is supported by every witness who has testified, with the single exception of West, who says that he attended the sale, and after the property was put up by the sheriff, heard Wattles publicly say that he had a mortgage on the property executed by Johnson, for \$12,000. But the testimony of West is contradicted, and I think perfectly destroyed by the witnesses examined, who were present at the time; all unimpeached, and ten in number. And how could the declaration of Wattles, in relation to this mortgage, be deemed public, even if it were made to West, when the sheriff, and every other person present, who has been examined, heard nothing of it. In fact, it is not to be presumed, that Wattles should have made such a declaration in the presence and hearing of those witnesses, as he had before that time declared to most of them, that he had purchased the equity of redemption of Johnson.

Nor can I imagine that any beneficial object, as to Wattles, could exist for continuing the mortgage. Indeed, it was for his advantage that it should merge; for, by the merger, he became absolute owner in fee, and went into actual possession of the premises, whereby he was enabled to obtain a credit from the respondent, which, as mortgagee, he probably could not have obtained.

There are no circumstances from which the law can raise a presumption in favor of the existence of this mortgage, either on account of any supposed advantage to Wattles, or any disability on his part to make an election.

The mortgage being thus merged, in judgment of law, no subsequent intention or act of his could make it a valid subsisting incumbrance as to that part of the premises purchased by him at the sheriff's sale. This is a necessary consequence of the legal principle in relation to merger. The mortgage had become cancelled, and was completely extinct, so far forth as the titles had united in Wattles.

The assignment of this instrument to the appellant, on the 9th November, 1818, therefore, passed nothing, except the ratable proportion which that part of the premises purchased by Sabin would have to contribute. The true test of the assignee's rights is, what interest could the mortgagee give at the time of executing the assignment? That,

and that only, could pass to the appellant; for Wattles could confer no greater or other interest than such as he at that time possessed; and if he had legally released three-fourths of the premises to Johnson, from the effect of this mortgage, before the assignment to the respondent, it would hardly be pretended that the assignee, under such circumstances, could hold the parts thus released, still subject to the mortgage; and, in judgment of law, he had thus released before the assignment.

There is no rule more distinctly settled than this, that the assignee of a mortgage takes it, subject to all the equities subsisting between the mortgagor and mortgagee at the time of the transfer. The circumstances of this case clearly demonstrate the propriety, the justice and the necessity of the rule, that whenever the two estates are united, the equitable estate should merge; otherwise, *bona fide* purchasers, using every possible precaution and diligence, might be defrauded or postponed to the assignee of a dormant mortgage.

But the decree of his Honor, the Chancellor, is, in my judgment, erroneous as to that part of the premises purchased by Sabin. In him there was no legal estate into which the equitable could sink. The legal and equitable estates were never vested in Wattles, he having parted with the former by an assignment of the mortgage to the appellant anterior to his acquiring the Sabin title. Wattles, therefore, had a perfect right, at the time he made the assignment, to pass the mortgage, as to this portion of the premises, to the appellant. And that right, having been thus fairly and legally acquired, in the ordinary course of business, should not be defeated, or at all affected, by a subsequent conveyance from Sabin to Wattles, to which the appellant was an utter stranger, unless, in order to protect himself against an innocent purchaser, he was bound to register the assignment.

I am of opinion, that the appellant was not bound by any rule of law (however prudent it might have been), to record the assignment of the mortgage. It is not embraced in the words of the act relative to military titles; for the premises in question are not included in the military bounty lands, as was assumed by his Honor the Chancellor. Nor was the appellant bound to give notice of the assignment to any person but the mortgagor. The case of *Williams v. Sorrell*, 4 Ves. 389, relates only to dealings between mortgagor and mortgagee, before notice of assignment, and has no application to dealings between mortgagee and third persons, who are not parties to the original contract.

The moneys, therefore, that might arise from the sale of that portion of the mortgaged premises, or so much thereof as would amount to its ratable proportion, ought, in my judgment, to have been awarded to the appellant.

Much has been said on the subject of the appellant's prior judgment. In answer to that, I will only remark, that if any reliance is to be placed on the validity of that judgment, the appellant has a clear and certain remedy at law to enforce it, and ought not to ask this Court or the Court of Chancery to aid him for that purpose.

I am of opinion, that the decree of his Honor the Chancellor should be reversed, so far as it respects that portion of the premises purchased by Sabin, and affirmed as to the residue.

BRONSON, CLARK, EASON, LYNDE, MCINTYRE, OGDEN, THORN and WHEELER, Senators, concurred.

BOWKER and WOOSTER, Senators, were for affirming the Chancellor's decree.

A majority of the Court being for a reversal of the decree the following rule was thereupon entered:

RULE. This cause having been heard, and due deliberation being thereupon had, and the bill, as to the defendant Caleb Johnson, having been taken *pro confesso*—It is ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery of the 28th day of Oct. A. D. 1822, be, and the same is hereby reversed and vacated.

And it is further ORDERED, ADJUDGED and DECREED, that it be referred to one of the Masters of the said Court, to ascertain and report the balance justly due for principal and interest, upon the mortgage from the defendant, Caleb Johnson, to James O. Wattles, mentioned in the pleadings in this cause, and also the balance justly due to the appellant, for principal and interest, on the bond from James O. Wattles to the appellant, also mentioned in the pleadings in this cause.

And it is further ORDERED, ADJUDGED and DECREED, that upon the coming in and confirmation of the said report, the mortgaged premises, as the same are described in the said mortgage from the defendant, Caleb Johnson to the said James O. Wattles, to wit—All that certain piece or parcel of land, (*describing the mortgaged premises*) or so much thereof as may be requisite, be sold at public auction, at the court-

house in the county of Onondaga, or on the premises, by any one of the Masters of the said Court of Chancery, the said Master giving six weeks' public notice of the time and place of such sale, by an advertisement, containing a brief description of the said premises, to be inserted in a public newspaper printed in the said county, and a copy thereof to be affixed on the outer door of the said court-house; and, further, that the Master making such sale execute to the purchaser or purchasers of the said premises, a good and sufficient deed or deeds of conveyance for the same, and out of the proceeds of such sale pay to the solicitor of the appellant, the appellant's costs in the Court of Chancery to be taxed, and also the balance so reported to be due to him, upon the aforesaid bond and judgment, with interest from the date of the report, taking receipts for such payments, and filing the same, with the report of such sale; and that he bring the residue of the proceeds, if any there be, into the said Court of Chancery, to be applied under the order of the said Court, towards the payment of any balance, to be ascertained as the said Court shall direct, that may be found due to the respondent, Davenport Morey, from the said James O. Wattles; and that the Master make report of his proceedings in the premises, with all convenient speed.

And it is further ORDERED, ADJUDGED and DECREED, that the said Caleb Johnson and Davenport Morey, on the request of the complainant or his solicitor, or of the purchaser or purchasers of the said mortgaged premises, deliver over all deeds, demises or writings, whatever, relating to or concerning the said mortgaged premises.

And it is further ORDERED, ADJUDGED and DECREED, that the said Davenport Morey, and all persons claiming under him, or who have come into the possession of the mortgaged premises, *pendente lite*, deliver and yield up the possession thereof to the complainants, or to whomsoever shall become the purchaser or purchasers thereof at said sale, on his, her or their producing to the said Davenport Morey, or to the person or persons in the possession of the said mortgaged premises, the deed executed by the Master pursuant to such sale as aforesaid, or that, in default thereof, a writ or writs of execution issue, for the purpose of putting such purchaser or purchasers into such full and peaceable possession.

And it is further ORDERED, ADJUDGED and DECREED, that the record and proceedings be remitted to the Court of Chancery, that this decree may be fully executed.

"Merger is described as the annihilation of one estate in another. It takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged—that is, sunk or drowned in the greater." BURKS, J., in *Garland v. Pamplin*, 32 Gratt. 305; and see 2 Blackst. Com. 177; *Lockwood v. Sturdevant*, 6 Conn. 373.

**Distinction between Merger and Extinguishment and Surrender
—Popular use of word Merger.**

Merger in its effects is very similar to extinguishment and surrender, although clearly distinguishable from them. Strictly speaking, merger, properly so called, should be confined to the sinking of one estate in another, or, at most, it should embrace, in addition, the extinction of an incorporeal hereditament through the union of its ownership with that of the land in over or upon which it is exercisable; but, as there has been introduced into our law, from the Roman law of debtor and creditor, the doctrine of *confusio*, called amongst us, when applied to a charge or an equity, extinguishment—that is, the extinction of a charge or equity by its passing into the hands of the owner of the land charged—and as such extinguishment is popularly spoken of as a merger, we shall consider it in this note without drawing any careful technical distinction between it and merger proper; for at the present day, at least, no matter what may have been the case formerly, they are governed by the same general rules, and produce practically the same effects.

Circumstances necessary to give rise to Merger—Two or more Estates in the same Subject must meet in the same Person.

Following, with some modification, Mr. Preston's arrangement of this part of the subject, we find that the following circumstances must concur to give rise to a merger:—

1. Two or more estates in the same lands, or in the same parts of the same lands, must meet in the same person, 3 Prest. Conv. 50; *Garland v. Pamplin*, 32 Gratt. 305; 2 Bouv. Ins. 378 *et seq.*; 2 Min. Inst. 368. A result of this requirement is that if a person be seized of a legal estate and of an equitable estate, which estates are distinct but which, if they were both legal, would merge, the outstanding legal estate in the trustees will prevent a merger—this is well illustrated by *Garland v. Pamplin*; in that case Mrs. Pamplin became entitled to certain realty; before reducing it to possession her husband made a deed conveying all his interest therein to trustees for his wife, with power in his wife to make disposition as though

a feme sole; it was held that Mrs. Pamplin acquired, in equity, a separate estate in her husband's interest conveyed to the trustees, which was distinct from her legal estate in fee, and which would not merge in her said legal estate. In *Little v. Bowen*, 76 Va. 724, the legal title to dower was outstanding in a trustee, the owner of the equity of redemption purchased the widow's dower right; it was held that the fee, or equity of redemption, and the dower did not merge, and see *Hospes v. Almstedt*, 13 Mo. App. 270; and in *Hatz's Appeal*, 40 Pa. St. 209, one Sherrett held a mortgage in trust for Mrs. Shroeder, the mortgage having been given by Mr. Shroeder, who, three days after giving it, confessed a judgment to one Reed; subsequently Shroeder and wife conveyed the land, subject to the mortgage, to one Russell, who conveyed to Mrs. Shroeder; it was held that no merger was brought about by Mrs. Shroeder's acquisition of title to the land covered by the mortgage held in trust for her. The question of intent, presumable from interest, it is true, entered into this case, but the court in giving judgment said: "The trust, therefore, was of itself sufficient to defeat the implication of extinguishment."

The more Remote of the two Estates must be the next Vested Estate.

2. The more remote estate, of the two meeting, must be the next vested estate in remainder or reversion, without any intervening vested estate, 3 Prest. Conv. 50; 4 Kent Com. 101; for the existence of any intermediate vested estate, or, in modern practice, right will prevent a merger, *Evans v. Kimball*, 1 Allen, 240; *Hunt v. Hunt*, 14 Pick. 374; *Loud v. Lane*, 8 Metc. 517; *Grover v. Thatcher*, 4 Gray, 526; *Buffum v. Deane*, Id. 385; *Myers v. Brownell*, 1 D. Chip. 448. As to the effect of an intervening contingent estate, it is said that it will not prevent a merger, except where it is a remainder created in the same instant of time, or by the same act, which gives origin to the other estates, 3 Prest. Conv. 50; and it seems that such interest will, at common law, be destroyed by the merger of the two other estates when such merger takes place by conveyance or act of the parties, *Purefoy v. Rogers*, 2 Saund. 387; but the authorities are not at one as to the effect of a merger brought about by a descent. Mr. CHITTY, Blackst. Com. Lib. 2, p. 177, note, however, says that the difference may be reconciled, by distinguishing between the cases where the descent of the greater estate is immediate from the person by whose will the less estate, as well as the intermediate contingent estate, was limited, and the cases where the less estate and the contingent remainder were not created by the will of the ancestor from whom the greater estate immediately descends on the less estate. In the cases of the first class—as

examples of which *Boothley v. Vernon*, 9 Mod. 147; *Plunkett v. Holmes*, 1 Lev. 12; *Archer's Case*, 1 Co. 66, are cited—the intermediate contingent remainders will not be destroyed; in cases of the second class they will be, *Hartpole v. Kent*, T. Jones, 77; S. C., 1 Ventr. 307; *Hooker v. Hooker*, Rep. temp. Hardw. 13; *Doe v. Scudamore*, 2 Bos. & Pull. 294. If the contingent estate be a remainder depending on the former of the two estates, vested in the same person and created by the same conveyance, then when the union of the inheritance and the particular estate is brought about, not by a conveyance, accident or circumstance distinct from the original creative conveyance, but by the fact that there is in such instrument limited a remainder or reversion to the particular tenant, of such a character that it would naturally drown the particular estate, the contingent remainder will not be destroyed, but the merger will be *sub modo* and so that the union will open or close, as may be required by the rights attached to the contingent remainder, *Lewis Bowles' Case*, 11 Co. 80; *Fearne*, Con. Rem. 346; and see *ante*, Vol. 2, p. 366; and by statute in New York, Michigan, Minnesota, Wisconsin, and California, see *ante*, Vol. 2, p. 368, a contingent remainder is protected from destruction by a merger of antecedent and subsequent estates.

An intervening lease for years will prevent a merger, but a mere *interesse termini* will not; nor will an interest or right merely exercisable in the land. Thus in *Logan v. Green*, 4 Ired. Eq. 370, one Hall, in 1823, made a lease of certain land to one Owens for thirty years; he subsequently conveyed to one Coggins, who, in 1831, with the consent of Owens, made a lease to Dews and others, and, later, made a deed to one Logan for the mineral rights, firewood, etc., upon the land. Owens subsequently purchased the reversion. The court held that while an outstanding lease, even if concurrent with one already existing, would prevent a merger, yet a lease to begin *in futuro* would not, for that would be a mere *interesse termini*; and also held that the lease, so called, of mineral rights, etc., would not prevent a merger, for such things were properly the subject of a sale and not of a lease.

The fact that part of an estate is outstanding may prevent a merger. Thus in *Clark v. Clark*, 56 N. H. 105, G. W. Clark executed a mortgage to S. H. Clark, his father. S. H. Clark devised his estate, including the mortgage, to G. W. Clark and wife for life as tenants in common, with remainder to their children. One of the children died intestate. G. W. Clark made an assignment in bankruptcy and the assignee conveyed the equity of redemption to a third person. A bill for a foreclosure being filed, it was contended that the assignee's deed passed all that Clark took under his father's will and all that he inherited from his child, as well as

the equity of redemption; but the court held that such was not the case, LADD, J., in the course of his opinion, said: "Whether that is so or not manifestly depends upon whether the equity merged those fragments of the interest of the mortgagee when the two estates met in him. It seems to me that no such merger could have taken place. The owner of any part of a mortgage has the whole premises for his security. His mortgage cannot be extinguished as to any part or interest, whether divided or undivided, in the land conveyed, without his assent. In order that the equity of redemption may drown the mortgage, the whole mortgage interest—that is, the whole legal estate—must meet in the same person. It follows that, at the time of the bankruptcy, G. W. Clark had two distinct interests in the land—those of mortgagor and mortgagee—which were kept from blending by the fact that part of the mortgage was at the same time outstanding in other persons; and see also *Carpenter v. Gleason*, 58 Verm. 244.

Estate in Remainder or Reversion must be as large as the Merged Estate.

3. The estate in reversion or remainder must be as large as, or larger than, the estate to be merged, 3 Prest. Conv. 51. The expression "large or larger" must be, of course, taken in the technical sense; thus an estate for life is larger than an estate for years, although death may destroy the former estate long before the efflux of time has brought the latter to a conclusion. Thus if a lease be made for years, with a remainder to the lessee for life, the estate for years will merge; but if there be an estate for life, with remainder to the life tenant for years, there will be no merger, Co. Litt. 54 b. In *Sheehan v. Hamilton*, 4 Abb. App. 211, it is said that estates of equal degree do not merge; but whether this be strictly so or not, the effect of a merger will be produced by the unity of possession. An estate at will will merge in an estate for years, 3 Prest. Conv. 176; estates for years may merge in each other or in estates for life; estates for life will merge, Co. Litt. 338 b; *Cary v. Warner*, 63 Me. 571; *Allen v. Anderson*, 44 Ind. 395; a lease will merge in the fee, *Carroll v. Ballance*, 26 Ill. 9. Reasoning upon analogy to the rule that the greater estate cannot merge in the less, it is held that a mortgage will not merge in a decree of foreclosure, or in a judgment thereon, for it is a higher security, *Helmbold v. Man*, 4 Whart. 410; *Teal v. Hinchman*, 69 Md. 379.

It is to be noticed that, when a merger takes place, the qualities attached to the merged estate will not be attributed to the merging; thus where there is an estate for years, the lessee being dispossessible for waste, and the

lessee acquires the estate for life, he will become punishable for waste, *Lewis Bowles' Case*, 11 Co. 83.

In Maryland it is provided by statute that when the reversion of any land expectant upon a lease is merged in any other estate, the person entitled to such estate shall have the same remedy, against the lessee or his assigns, for rent or forfeiture or breach of covenant, as the person entitled to the original reversion could have had, Rev. Code (1878), Art. 45, § 6, p. 398.

Estates must be in same Right, or if in Different Rights one must not be an Accession to the other by Act of Law.

4. The several estates must either be held in the same right or, if they are held in different rights, one of them must not be an accession to the other merely by act of law, 3 Prest. Conv. 51. To this, we think, it may be added that there may be cases in which the estates are held in different rights, and the accession has been by act of the party, where, nevertheless, the requirements of justice will prevent a merger.

The law as above stated, has not been settled without much discussion. Lord COKE says: "A master of a hospital being a sole corporation by the consent of his brethren, makes a lease for years of part of the possessions of the hospital; afterwards the lessee for years is made master, the term is drowned; for a man cannot have a term for years in his own right and a freehold in *autre droit* together (as if a man lessee for years take a *feme* lessor to wife)," Co. Litt. 338 b. On the other hand, Blackstone, Com., Lib. 2, p. 177, says positively that the two estates must "come to one and the same person in one and the same right, else if the freehold be in his own right and he has a term in right of another, there is no merger." According to Mr. Preston, 3 Conv. 285, 286, neither of these positions is the correct one, he says: "From a collective view of all the cases, the distinction really established by them is not generally that there will not be any merger because the two estates are held in different rights or because the freehold is held by the owner of the term in his own right and the term in *autre droit*. It is only that the accession of one estate to another merely by the act of the law, as by marriage, by descent, by executorship, intestacy, etc., will not occasion a merger of one estate in the other where the two estates are held in different rights; while a descent of the inheritance will merge a term which a person has in his right at law, though he be a trustee of that term." This statement the learned author supplements with an exhaustive review of authorities. Kent, after citing Preston, says: "The several estates must be generally held in the same legal right; but this rule is subject to qualification, and

merger may take place even when the two estates are held by the same person in different rights, as when he holds the freehold in his own right and the term *en autre droit*. If they are held in different legal rights there will be no merger, provided one of the estates be an accession to the other merely by the act of law, as by marriage, by descent, by executorship or intestacy. This exception is allowed on the just principle that as merger is the annihilation of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, infants, legatees, husbands or wives. But the accession of one estate to another is when the person in whom the two estates meet is the owner of one of them, and the other afterwards devolves upon him by the act of the party, or by the act of law, or by descent, or in right of his wife, or by will. If the other estate, held in another's right, as in right of the wife, had been united to the estate in immediate reversion or remainder, by act of the party, as by purchase, the merger would take place. The power of alienation must extend to the one estate as well as to the other in order to allow the merger," 4 Kent Com. 101. In *Clift v. White*, 15 Barb. 70, the Supreme Court of New York, in the fifth district, applied the rule, as laid down by Preston, to a case in which an executor, entitled to a mortgage in his representative capacity, bought in his own right the fee, at a foreclosure sale under a second mortgage, citing as additional authority the dictum of Lord ST. LEONARDS that the purchase of the fee by an executor, in his own right, will merge a term, held by him as executor, except as to creditors, Sugden on Vendors, 460.* ALLEN, J., in delivering the opinion of the court, stated the rule to be "that a merger will take place upon the union of a greater and less estate in the same person, although they may be held as different rights, provided the accession of one estate to the other is by the act of the party and he has the same right to dispose of the lesser estate under the same circumstances and to the same extent that it would take place if the estates were held in his own right, leaving it in equity to be determined as a question of intent expressed or implied." The mortgage was held merged. On appeal the decision of the Supreme Court was reversed, 12 N. Y. 519. MARVIN, J., in his opinion in the Court of Appeals, pointed out that all the cases cited by Preston related to terms of years, and that he had been careful to say that the cases showed the application of the doctrine only as between terms of years on the one hand and the freehold on the other, and demonstrated the inapplicability of the principle to the case before the court, as follows:

* The edition from which this citation is made does not appear. The passage relied upon by the learned judge is star paged as 395 in the American edition of 1828, and that is probably the proper page in the English edition.

"A term for years is a legal estate, the legal title to which vests in the executor, and he has the same control over it that he has of any of the chattels of the testator. By purchasing the reversion or fee he does an act by which he declares that he appropriates the chattel to his own use, and thus makes himself liable as for a devastavit. Are these cases and the principles upon which they rest applicable to the present case, a case where the executor purchases for himself the premises at a sale upon a junior mortgage? Has Leitch made himself liable as for a devastavit? The cases referred to by Preston rest upon the doctrine of a devastavit, and no case touching a mortgage in the hands of the executor is referred to. We do not find that the executor of a mortgagee has an estate in lands. What is then his interest? The statute calls it a debt secured by a mortgage, and makes it assets in his hands. It is a charge upon the land, and so styled in the books, Williams on Executors, 433; 2 Pow. on Devises, 145; *Forbes v. Moffatt*, 18 Ves. 384. And Preston, p. 567, says, 'If a charge upon land comes to the same person that is entitled to the land, there shall be no extinguishment on this account unless he has the same or the like interest in both.' This authority is not, perhaps, precisely in point to the present case. But the general rule in relation to charges is that when the estate, however acquired, comes to the person owning the charge upon it in his own right, there will not necessarily be an extinguishment of the charge." The learned judge then went on to dispose of the question under the equitable rule of intention. In *Denzler v. O'Keefe*, 34 N. J. Eq. 361, one Brunt held land in trust for O'Keefe; Brunt, afterwards, bought in a mortgage, given by O'Keefe and wife, paying for the mortgage and taking an assignment to himself; it was held that there was no merger, as the mortgage remained in Brunt's hands as security for the money he had advanced, and, consequently, that, when he subsequently sold the land, and assigned the mortgage to Denzler, the latter could foreclose, and judgments of Brunt's individual creditors were not liens upon the land.

It may be well here to remark that the legal unity of husband and wife will not be sufficient to work a merger, where one right becomes vested in the husband and the other in the wife, *Cooper v. Whitney*, 3 Hill, 95; and see *Model Lodging House Association v. Boston*, 114 Mass. 133.

Exceptions to Doctrine of Merger.

Exceptions to the application of the doctrine of merger are as follows:—

(1) One may have an estate tail and the reversion in fee, and the estate tail will not merge, *Wiscot's Case*, 2 Co. 61; *Lord Stafford's Case*, 8 Id. 73 b; Blackst. Com., Lib. 2, p. 178; *Lockwood v. Sturdevant*, 6 Conn. 373,

and see *ante*, Vol. 1, p. 103; for, if the doctrine of merger applied in such a case, it would be in the power of tenant in tail, by purchasing the reversion, to defeat at once the inheritance of his issue and the will of the donor.

(2) The doctrine will not apply, at law, to estates arising under the statute of uses, where the owner of the term, or particular estate, is the instrument, mediately or immediately, for raising the uses, so that they are to arise out of the estate conveyed to him, 3 Prest. Conv. 369.

(3) The doctrine does not apply to an estate for several lives, arising under the same limitation as one undivided and entire time of continuance; but when there is a lease for several lives, at distinct periods of time, giving one estate in possession and the other estates in remainder, then, when the estate in remainder is as large as or larger than the particular estate, there may be a merger, 3 Prest. Conv. 406.

(4) When two estates are united in the same person by means of the joint act of the respective owners of the estates, with an intention that the estate of their assignee should continue for the collective time of their several estates, merger will not take place, 3 Prest. Conv. 51.

Term Merger used with reference to Rights and Incorporeal Hereditaments.

Hitherto the instances of merger spoken of have been, almost exclusively, of estates, but it is to be borne in mind, that the term is used with reference to other rights in and to realty, and with reference to incorporeal hereditaments; thus a right of way will merge when the right and the ownership of the *locus in quo* become vested in the same person, *Atwater v. Bodfish*, 11 Gray, 150; and the merger will take place although the way has existed by twenty years previous adverse user, *Atwater v. Bodfish, supra*; but the unity which extinguishes a prescription must be such that the estates in the land *a quo* and the land *in quo* are equal in duration, quality and all other circumstances of right, *Reed v. West*, 16 Gray, 283.

Rents may be merged in the fee, *Rankin v. Wilsey*, 17 Iowa, 463; and so may charges on land, and, perhaps, the case in which the question of merger arises most frequently is where a mortgage and the land bound by it become vested in the same person.

Merger of Titles.

When two titles to the same land meet in the same person, they are said to be merged, and there seems to be no way by which they can be kept separate so that the owner can transfer one and keep the other, *Logan v. Steele's Heirs*, 7 T. B. M. 101. Where the two titles come from the same

source, as where, having taken a conveyance of land subject to a judgment, the grantee buys in the property at a sheriff's sale on the judgment, the last acquired title will merge in the first, though equity will prevent such merger from working injustice, *Hancock v. Fleming*, 103 Ind. 533.

Rule of Merger at Law.

The rule of merger is said to be inflexible at law, *Welsh v. Phillips*, 54 Ala. 309; but it is questionable whether this is not rather too general a statement, for while, undoubtedly, the law does ordinarily determine a question of merger without being governed by the intent of the person to be affected thereby, and in some instances causes a merger against what would presumably be his intent; yet intention, as appears above, does enter sometimes and to a certain extent, into the determination of the question, even at law, and a better statement seems to be that, at law, while the intention is considered, yet it is not the governing principle in the application of the rule.

In Equity.

In equity the rule is anything but inflexible, *Fassett v. Mulock*, 5 Col. 466; *Slocum v. Catlin*, 22 Vt. 137; and with equity, on account of the frequent hardship which would be worked by a rigid enforcement of the doctrine of merger, as for example by advancing subsequent charges where the owner of a charge acquired the estate charged, the doctrine itself has never been a favorite, *Penington v. Coats*, 6 Whart. 277; *Dougherty v. Jack*, 5 Watts, 456; *Grellet v. Heilshorn*, 4 Nev. 526; and so far has equity in this respect impregnated the law, that merger is now said not to be favored even at law, *Simonton v. Gray*, 34 Me. 50. In England, by the Act of 36-37 Vict. c. 66, § 25, subsec. 4, which came into force November 2, 1874, it was enacted that "there shall not after the commencement of the Act be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity," and in this country while, so far as we are aware, there has been passed no statute equivalent in force to the one just cited, yet equity has so far tempered the common law that the strict rule of legal merger may be said to be practically extinct.

Equitable Doctrine of Merger—Merger or no Merger Dependent on Intent.

It is proposed now to consider the modern or equitable doctrine of merger, which may be stated to be in general as follows, though, of course,

subject to such modification as equity may require: Merger will or will not take place, in accordance with the intention of the person whose estate is to be affected by the merger, and, generally, though not universally, when the person in whom the two estates, or the estate and a right, become united, intends to keep them separate, no merger will take place, *Richards v. Ayres*, 1 W. & S. 485; *Campbell v. Carter*, 14 Ill. 286; *Jarvis v. Frink*, Id. 396; *Champney v. Coope*, 32 N. Y. 543; *Fowler v. Fay*, 62 Ill. 375; *Smith v. Roberts*, 91 N. Y. 470; *Bassett v. Mason*, 18 Conn. 131; *Knowles v. Lawton*, 18 Ga. 476; *Freeman v. Paul*, 3 Me. 260; *Polk v. Reynolds*, 31 Md. 106; *Franklyn v. Hayward*, 61 How. P. 43; *Rawiszer v. Hamilton*, 51 Id. 297; *Aiken v. Milwaukee and St. Paul R. Co.*, 37 Wisc. 469; *Richardson v. Hockenhull*, 85 Ill. 124; *Duncan v. Smith*, 31 N. J. Law, 325; *Davis v. Pierce*, 10 Minn. 376; *Wickersham v. Reeves*, 1 Iowa, 413; *Mallory v. Hitchcock*, 29 Conn. 127; *Knowles v. Carpenter*, 8 R. I. 548; *Woodward v. Davis*, 53 Iowa, 694; *Rumpp v. Gerkens*, 59 Cal. 496; *Pike v. Gleason*, 60 Iowa, 150; *Hospes v. Almstedt*, 13 Mo. App. 270; *Carpentier v. Brenham*, 40 Cal. 235; *Pennock v. Eagles*, 102 Pa. St. 290; *Besser v. Hawthorn*, 3 Oreg. 129; *Wallace v. Blair*, 1 Grant, 75; or as said by RUNYON, Ch., in *Andrus v. Vreeland*, 29 N. J., Eq. 394: "A court of equity will keep an incumbrance alive or consider it extinguished as will best serve the purposes of justice and the actual and just intent of the party," and see *Mulford v. Peterson*, 35 N. J. Law, 129; and it is to be observed that not only will equity relieve against what would be a merger at law, but where justice requires it, it may hold that to be merger which would not be so at law; this doctrine was in effect laid down by Sir WILLIAM GRANT, in *Forbes v. Moffatt*, 18 Ves. 384, which is undoubtedly the leading case upon the question of equitable merger, and which we find cited in almost every opinion in which that question is considered.

Intent to be Subserved must be Innocent.

The intent which is to be subserved by the prevention of a merger must be one which works injury to no one, *Starr v. Ellis*, 6 Johns. Ch. 393; *Clos v. Boppe*, 8 C. E. Gr. 270; *Andrus v. Vreeland*, 29 N. J. Eq. 394, for while a merger will never be presumed against the equities of the parties, *Myers v. Hewitt*, 16 Oh. 453; *Corwin v. Collett's Exr's*, 16 Oh. St. 289; *Loomer v. Wheelwright*, 3 Sand. Ch. 157; *N. E. Jewelry Co. v. Merriam*, 2 Allen, 390; *Clary v. Owen*, 15 Gray, 521; *Gregory v. Savage*, 32 Conn. 264; *Vannice v. Bergen*, 16 Iowa, 562; *Bell v. Woodward*, 34 N. H. 90; *Barker v. Flood*, 103 Mass. 474; *Edgerton v. Young*, 43 Ill.

464, a court of equity will never permit an incumbrance or outstanding estate to be kept up for the purpose, or where it would have the effect, of injuring one who has acted upon the faith of a merger, as, in the example given in *Starr v. Ellis*, a subsequent *bona fide* purchaser deriving title from the person who has consolidated in himself the legal and equitable title; and see *Hatch v. Kimball*, 16 Me. 146.

Application of Rule of Intent.

Bearing the rule and the above-stated qualification in mind, we may turn to the application thereof, and first it may be remarked that where an equitable title to, or an equity in, land meets with the legal title to the same, in the same person, there will be, generally speaking, a merger unless an intent to the contrary appear, *Gardner v. Astor*, 3 Johns. Ch. 53; *Weiner v. Heintz*, 17 Ill. 259; *Campbell v. Carter*, 14 Id. 286; and it would seem that, in general, to support this intent to prevent a merger, there must be some beneficial interest of the owner, *Lockwood v. Sturdevant*, 6 Conn. 373, or of a third person, *Weiner v. Heintz*, *supra*, to be subserved by keeping the estates distinct; applying this to the case of a mortgage, KENT, Ch., said: "Unless some beneficial interest for keeping up the distinction clearly appears, we ought rather to adopt the ordinary and natural conclusion that when the owner of the equity of redemption pays off a subsisting mortgage he does it to exonerate the estate," *Gardner v. Astor*, *supra*. The question of the effect of the union of a mortgage with the equity of redemption will be found treated further on in this note. See p. 245.

So far has the force of an intent been carried that it is held, that where a pleading sets up an intent to maintain an incumbrance separate from the fee, unless the answer deny the intent, a merger will be prevented, although the answer set up facts which go to show a contrary intent, it being said: "The answer does not deny the fact in the complaint which saves the mortgage," *Wilcox v. Davis*, 4 Minn. 197; and the intent has been allowed to control the expression in a deed, that the conveyance is in satisfaction of a mortgage, where the testimony showed that there was no intent to release the lien, *Rumpp v. Gerkens*, 59 Cal. 496.

Equitable will Merge in Legal Estate, except where such Merger would defeat the Intent of a Devisor or Grantor.

Where the legal and equitable estates meet in the same person the latter will be merged in the former, thus where the legal estate descends *ex parte materna* and the equitable estate descends *ex parte paterna* upon the same person, merger will take place, and in a future descent of the land the line

of the legal estate will be followed, *Nicholson v. Halsey*, 1 John. Ch. 417; and so where the *cestui que trust* acquires the legal estate, or the trustee the beneficial estate, there will be a merger, for a man cannot be trustee for himself, *Den ex d. Wills v. Cooper*, 25 N. J. Law; 137; 1 Cruise, Tit. 12, Ch. 2, § 35, p. 414; Hill on Trustees, 252; Lewin on Trusts, 6th ed. p. 14; but if by the terms of the trust it is to continue until after a certain time, then the trustee cannot, by deed or will, vest the legal estate in the *cestui que trust* before the arrival of that time and so cause a merger and defeat the will of the devisor or grantor, *Den. ex d. Wills v. Cooper*, *supra*.

Legal Estate will not Merge in an Equity.

On the other hand, the legal estate will never merge in an equity, *Penington v. Coats*, 6 Whart. 277; *Little v. Ott's and Key's Heirs*, 3 Cr. C. C. 416.

Judgment Lien extinguished ordinarily when the Lien Creditor purchases the Land subject thereto.

Ordinarily, the lien of a judgment will be extinguished when the judgment creditor purchases the land which is subject to the lien, *Koons v. Hartman*, 7 Watts, 20; but, if equity require it, the lien may be kept in force, *McClain v. Sullivan*, 85 Ind. 174; *Ziegler v. Long*, 2 Watts, 205.

Intent to prevent Merger, how manifested.

The intent to keep alive the charge, incumbrance or lesser estate may be expressed or implied.

It may be expressly manifested by a reservation in the writing conveying, or agreeing to convey, either of the estates, *Moore v. Harrisburg Bank*, 8 Watts, 138; it may be by a declaration in the conveyance, as in the assignment of a mortgage to the grantee of the equity of redemption, *Binsse v. Paige*, 1 Abb. App. 139; or by an agreement in writing, executed simultaneously with the conveyance of land subject to a mortgage, that a merger shall not take place, except at the election of the mortgagee, *Spencer v. Ayrault*, 10 N. Y. 202; and where there has been fraudulently inserted in a deed a clause, which has the effect of bringing about a merger, parol evidence has been allowed to show that the intent, at the time of the conveyance, was that there should be no merger, *Fuller v. Lamar*, 53 Iowa, 477.

The intent need not, however, be express; it may be presumed from the actions of the party at the time of taking title, *Besser v. Hawthorn*, 3

Oreg. 129; *Franklyn v. Hayward*, 61 How. Pr. 43; or, as we shall see later, from acts which, though not contemporaneous with the act of taking title, throw a light upon the probable intent of the taker; thus, where a mortgagee stands by and allows part of the mortgaged premises to be sold to another person and buys in part himself, the presumption is, that he did not intend the mortgage should merge, *James v. Morey*, 2 Cow. 246; an intent against merger is inferable where the two estates, or the estate and the right, are taken by separate and simultaneous conveyances from the same person, as where one takes a conveyance of a ground-rent and of the estate out of which the ground-rent arises by separate deeds from the same person, *Cook v. Brightly*, 46 Pa. St. 439; so where the owner of the fee, who is not a party to a mortgage thereon, pays the debt secured by the mortgage and takes an assignment of the mortgage, there will be evidence of an intent to keep the latter alive, *Kellogg v. Ames*, 41 N. Y. 259, and see *Goodwin v. Keney*, 47 Conn. 486; a new mortgage for the same debt will not merge the old one, where it is evident that there has been merely a change of the form of security, *McKay v. Obenchain*, 58 Miss. 670. In *Pennock v. Eagles*, 102 Pa. St. 290, four sons were entitled under the will of their father to certain realty, subject to charges created by the will as follows: "I direct that the \$1800 hereinbefore willed to my daughter, Eleanor Pennock, remain a lien on my real estate willed to my four sons, during her natural life, and that lawful interest paid to her by my said sons, which interest is to be her full legacy, and if she should die leaving lawful issue, the said \$1800 willed to her shall be paid by my said sons to her said issue, but if she should die without lawful issue, then I direct that the said \$1800 . . . shall be and remain the property of my four sons. . . . I hereby direct that the \$2000 hereinbefore willed to my daughter Lydia Pennock, be and remain a lien on any real estate willed to my four sons, during her natural lifetime, and at her decease I desire that the said \$2000 willed by me to her shall be and remain the property of my said four sons. . . ." Amicable partition of the land was made, two of the sons conveying their estate to the other two, the latter covenanting to pay the legacies; one of the latter pair, John, afterwards conveyed to his cotenant his share, a covenant to pay legacies, similar to that in the former deed, being introduced into this conveyance. On the death of Eleanor, it was held that the right to the legacy, charged on the land and which was left in remainder to the sons, had not been merged in the fee, and that the intent to keep this charge distinct was shown by the covenant to pay, which was not regarded by the court as merely a covenant in relief of the liability to pay the interest to the daughters. In *Bassett*

v. *Mason*, 18 Conn. 131, a second mortgagee foreclosed and purchased; he subsequently acquired the first mortgage and the legal estate of an attaching creditor; the land was worth as much as the indebtedness for which it was liable; the mortgagee then brought an action on the note, to secure which the first mortgage was given; a suit was brought to enjoin him from proceeding with such action; the court said, "it is obvious from the answer of the defendant that his intention in purchasing the interest of Colbourn [the attaching creditor] and the Andrew mortgage, was to perfect in himself the entire estate in the land, both legal and equitable. By treating this debt as satisfied we carry out the purpose of the defendant and do justice to all."

Presumed Intent from Interest.

It often happens that there is no positive evidence of intent, one way or the other. In such a case the court will take into consideration what is for the interest of the taker of the estate; and if it appear that his interest will be best subserved should no merger take place, the court will assume that as it was for his interest, so it was his intention that there should be no merger, and will hold the estates, or the estate and the charge, separate, *Gibson v. Crehore*, 3 Pick. 475; *Decatur v. Walker*, 137 Mass. 141; *Campbell v. Carter*, 14 Ill. 286; *Hatch v. Kimball*, 16 Me. 146; *Freeman v. Paul*, 3 Me. 260; *Duncan v. Drury*, 9 Pa. St. 332; *Hopcock's Exr's v. Ramsey*, 28 N. J. Eq. 413; *Clos v. Boppe*, 8 C. E. Gr. 270; *Parker v. Child*, 10 Id. 41; *Wallace v. Blair*, 1 Grant, 75; *Davis v. Pierce*, 10 Minn. 376; *Powers v. Patten*, 71 Me. 583; *Lyon v. McIlvaine*, 24 Iowa, 9; *Mallory v. Hitchcock*, 29 Conn. 127; *Knowles v. Carpenter*, 8 R. I. 548; *Duffy v. McGuiness*, 13 Id. 595; *First National Bank of Lebanon v. Essex*, 84 Ind. 144; *McClain v. Sullivan*, 85 Id. 174; *Hembold v. Man*, 4 Whart. 410; *Pennock v. Eagles*, 102 Pa. St. 290; *Watson v. Dundee Mortgage and Trust Investment Co.*, 12 Oreg. 474; *Ann Arbor Savings Bank v. Webb*, 56 Mich. 377; and so far has this idea been carried, that it has been said that merger will only be allowed to take place where it is a matter of indifference, *Richards v. Ayres*, 1 W. & S. 485.

In pursuance of this rule, we find that wherever a merger would advance liens or charges upon the estate, which are held by third parties, so as to compel the owner of the land charged to pay what he, otherwise, would not be compellable to pay, there will be held to be no merger; as where one holds a lease for years of land, upon which there is a mortgage, and attachments of the land are subsequently made, under which the equity of redemption is sold, and afterwards the lessor conveys to the lessee, who undertakes to discharge the mortgage; the lease will be held not merged

in the fee conveyed, *Buffum v. Deane*, 4 Gray, 385. Where the mortgagee acquires the land mortgaged, or the judgment creditor acquires the land bound by the judgment, and there exist junior mortgages or liens, the judgment or mortgage will be saved from merger in order to protect the estate of the purchaser, *Baldwin v. Norton*, 2 Conn. 161; *Lockwood v. Sturdevant*, 6 Id. 373; *Fowler v. Fay*, 62 Ill. 375; *Bell v. Tenny*, 29 Oh. St. 240; *Edgerton v. Young*, 43 Ill. 464; *Tower v. Divine*, 37 Mich. 443; *Millspaugh v. McBride*, 7 Paige, 511; *Silliman v. Gammage*, 55 Tex. 364; *Watson v. Dundee Mortgage and Trust Investment Co.*, 12 Oreg. 474. And so where the purchaser of an equity of redemption acquires the mortgage, and there are attachments upon the land junior to the mortgage, he may protect himself by his mortgage title, *Grover v. Thatcher*, 4 Gray, 526; and see *Myers v. Brownell*, 1 D. Chip. 448; and it has been held that no merger would take place, even where the conveyance by a mortgagor to a mortgagee was expressed to be in satisfaction, where the latter was ignorant of the intervening mortgage, *Brooks v. Rice*, 56 Cal. 428; and the fact that the security which the purchaser holds extends to land, other than that which he has purchased, will not necessarily cause a merger when junior claims exist. Thus in *Knowles v. Carpenter*, *supra*, where the question arose, DURFEE, C. J., in delivering the opinion of the court, said: "The claim assumes that those other lands are still subject to the mortgage in favor of Ide and that these are not to be permanently charged as against the plaintiff under the deed from Northrup to Hadley; and if the assumption be correct, it may be a reason in equity for requiring Ide to resort to the other land for the satisfaction of his debt, before resorting to the land upon which the plaintiff is secured, or for securing to the plaintiff a like benefit by process of subrogation; but we do not think it a sufficient reason for presuming an extinction of said mortgage as respects the lands upon which the plaintiff is secured. In case of the insufficiency of the other lands, Ide might, with justice, resort to these, so far as necessary, for the satisfaction of his debt." A court will not enter into a nice calculation to overthrow the presumption of interest and so cause a merger to take effect. Thus in *Grellet v. Heilshorn*, 4 Nev. 526, in 1863 the defendant executed a mortgage to Grellet and Gagnon, in the proportion of nine-fifteenths and six-fifteenths; he subsequently executed two mortgages —one to Dohle and one to Staehler, in the order named. Grellet assigned his share of the first mortgage, and the note secured by it, to Stevenot, who took a conveyance of the fee from the defendant. In 1867 Stevenot reassigned to Grellet and began a foreclosure suit, which was dismissed; Grellet then began a foreclosure suit. A defence was taken on the ground that there had been a merger in Stevenot's hands, but the court said:

"Stevenot never surrendered the Grellet note, commenced suit to foreclose which was dismissed, as must be inferred, because he had previously reassigned to Grellet and suffered default in the present action. A merger rendered the estate presently liable for the amount of the Staehler and Dohle mortgages. It has been argued that by deed Stevenot was entitled to possession, and that the rents and profits consequent thereon would more than relieve the burden of the two mortgages, and, therefore, the interest of Stevenot was to merge. There is no proof that the property produced any income. From the facts of the case no actual interest to merge is shown and none can properly be presumed."

The fact that a merger would have the effect of giving dower as against the owner of the land, is held sufficient to give rise to the inference of an intent to prevent merger, *Simonton v. Gray*, 34 Me. 50; *Decker v. Hall*, 1 Edm. Sel. Cas. 279; *Savage v. Hall*, 12 Gray, 363; but where the mortgagor purchases the fee, it seems that, upon payment of her due proportion of the debt according to her interest, the mortgagor's widow will be entitled to dower. See *Woods v. Wallace*, 30 N. H. 384; *Norris v. Morrison*, 45 Id. 490:

Where the assignee of a bankrupt sold his land subject to two homestead mortgages to a person who afterwards bought in the mortgages, it was held that there should be no merger, since, in case a merger were allowed, the debtor's homestead right in the equity of redemption would be unjustly enlarged to an absolute homestead right in the land, *Fellows v. Dow*, 58 N. H. 21; and in *Vanderkemp v. Shelton*, 11 Paige, 28, the doctrine was extended so far as to protect the purchaser from liability as a guarantor. The case was as follows: One Hoyt conveyed to Kingman and Welty, and took a mortgage on the land conveyed for the purchase-money. Kingman and Welty conveyed the land to Shelton and Smith, who gave Kingman a mortgage thereon, together with a bond to secure the payment of \$5220 in ten yearly payments. Kingman assigned the second mortgage to A. C. Stevens, who assigned it to Evans and guaranteed payment thereof at maturity. Evans assigned to Vanderkemp; Hoyt foreclosed the first mortgage in 1837, without notice to the assignee of Stevens; Stevens purchased at the foreclosure sale, received a master's deed, and, subsequently, gave a mortgage on the land to Kissam, which was assigned to S. Stevens, to whom A. C. Stevens gave another mortgage; it was held the purchase by A. C. Stevens did not merge the first mortgage, because the intermediate mortgage was not foreclosed, and it was the interest of the purchaser to keep the estates distinct, so as to compel a resort to the personal liability of the original mortgagors for any deficiency after the first mortgage, and so save A. C. Stevens on his guaran-

tee; and see *Crow v. Tinsley*, 6 Dana, 402. The keeping alive of a possibility of survivorship has been held sufficient to prevent a merger. Thus, in *Wallace v. Blair*, 1 Grant, 75, Stormont executed a mortgage to M. and W. Jack. M. Jack obtained a judgment against Stormont, and levied upon and, on execution, bought the mortgaged premises and lot; it was held that the mortgage did not merge (1) because it was for the advantage of W. Jack that it should be alive, and (2) that it was also for the benefit of M. Jack that such should be the case, as said by the court: "He had always as one of the two joint mortgagees a right to keep the charge on foot for the purpose of taking his chance of survivorship, besides [it was] presumably against his interest to take payment before the debt was due."

It may be remarked, that in cases where the inference against an intent to produce merger is drawn from the existence of an outstanding incumbrance, it is the fact that there is such incumbrance that gives rise to the inference, and it is immaterial in what way it exists or by what method it has been called into life, *Evans v. Kimball*, 1 Allen, 240. Thus, the doctrine may be made use of to protect the title where the owner of land subject to a mortgage has given a mortgage and has subsequently taken an assignment of the first mortgage, *Id.*

Effect of Interest of Third Person on Question of Merger.

Where there is involved the right of a third person, which would be disadvantageously affected by a merger, then no merger will take place, *Dougherty v. Jack*, 5 Watts, 456; *International Bank of Chicago v. Wilshire*, 108 Ill. 143; for equity will never presume an intent to injure another, and as, as we have seen, it will not allow a merger to be prevented for the purpose of working harm, so neither will it allow a merger to be brought about when it would have the same effect. *Earle v. Washburn*, 7 Allen, 95, is an interesting example of the working of equity in this respect where the rights of the third person are strictly legal. One Davis conveyed land to certain persons as trustees for an unorganized religious society, to which they were to convey the land when they thought it useful. The society was organized, and built a house on the land; in order to enable the society to mortgage the said house to one Horne, the sureties conveyed the land to the society by a deed reciting its purpose; the society executed a mortgage to Horne and then reconveyed the land to the trustees; it was held that the conveyance to the society did not cause a merger, and hence that a creditor could not subsequently levy on the land for a debt of the society.

The interests of a third person will be protected against the consequences of merger, even when his rights are not of record, and against a purchaser where he has been put upon inquiry; thus in *Purdy v. Huntingdon*, 42 N. Y. 335, J. S. Mitchell, in 1855, executed a mortgage to M. Mitchell, which mortgage was recorded; on the same day the mortgage was assigned to Purdy, but the assignment was not recorded until 1864. In 1858, J. S. Mitchell conveyed the mortgaged premises to M. Mitchell, who, in 1859, conveyed to the defendants, it was held that the mortgage was not merged, even as against Huntingdon, who, having been put upon inquiry, was not protected by the fact that the assignment had not been recorded.

Merger of Mortgage in Fee.

The question of merger or no merger has most frequently arisen where the same person becomes possessed of both the fee or equity of redemption (we shall use the terms irrespectively, for they practically mean the same thing, and their common existence simply presents to the mind the different theories of a mortgage, the one regarding it as the legal estate, the other as an incumbrance or security*), and a mortgage upon the same land. Chancellor KENT, in *Starr v. Ellis*, 6 Johns. Ch. 393, held that where the owner of an estate bought a mortgage thereon, the presumption, in the absence of a declaration of intent to keep it up, or of an apparent benefit to be derived by the purchaser from keeping it up, was that the mortgage was sunk and extinguished; see, also, *Stantons v. Thompson*, 49 N. H. 272; *Bell v. Woodward*, 47 Id. 539; but, at the same time, it is held that there is not, under such circumstances, necessarily a merger, *Hinchman's Adm'rs v. Emans*, Saxt. 100; *Spurgin v. Adamson*, 62 Iowa, 661; and that the rule of intent, express or implied, governs in general, see *Gibson v. Crehore*, 3 Pick. 475; and the rule is the same where a deed of release or a quitclaim is taken of the mortgagee's interest, *Grover v. Thatcher*, 4 Gray, 526; *Wadsworth v. Williams*, 100 Mass. 126; *Duffy v. McGuiness*, 13 R. I. 595; and a release may be regarded as simply a release of a con-

* That the practical effect as to bringing about a merger is the same, whichever theory be adopted, may be readily seen; if the mortgagor be regarded as holding the fee subject to an incumbrance, then on a union of the fee and incumbrance the latter merges in the fee; if the mortgagor be regarded as holding a mere equity of redemption and the mortgagee the fee, then on a union, the equity merges in the legal fee. In either case the result would be the same as to charges; for the mortgagor would hold the fee subject to charges existing upon it when conveyed to him, and the equity of redemption would take precedence of and exclude charges put upon the fee by the mortgagee subsequently to the mortgage, and also would, when the mortgagor exercised his right to redeem, destroy the effect of a conveyance by the mortgagee.

dition, *Dexter v. Harris*, 2 Mason, 531. Where the owner of the land buys in a mortgage to protect his estate, there will be no merger, *Dircks v. Logdson*, 59 Md. 173; *DeLisle v. Herbs*, 32 N. Y. S. C. 485; in this latter case the plaintiff and an infant wife conveyed land which was subject to a mortgage; the grantee then bought the mortgage, in order to protect himself against a claim of dower in case the infant should disaffirm her deed; it was held there was no merger.

Where one of two mortgagors pays off by instalments the mortgage debt and, on payment of the last instalment, takes an assignment of the mortgage, there will be no merger, or extinguishment, so as to give priority to junior lien creditors, *Duncan v. Drury*, 9 Pa. St. 332; and see *Barker v. Flood*, 103 Mass. 474.

When the holder of an equity takes an assignment of a mortgage, which is in process of foreclosure, and goes on with the suit, no intention to merge is shown, *Knowles v. Lawton*, 18 Ga. 476.

Where the mortgagee takes a conveyance of the land, there will, in general, be no merger, for the presumption is, that he takes merely to avoid the expense of foreclosure, *Huebsch v. Scheel*, 81 Ill. 281; *Decatur v. Walker*, 137 Mass. 141; *First National Bank of Lebanon v. Essex*, 84 Ind. 144; this doctrine which is clearly contrary to the rule at law, see *Campbell v. Carter*, 14 Ill. 286; *Shinn v. Fredericks*, 56 Id. 439; *Weiner v. Heintz*, 17 Id. 259; *Lyman v. Gedney*, 114 Id. 388, has been sometimes qualified by the requirement that the mortgage shall be for an amount equal to or exceeding the value of the premises, *Richardson v. Hockenhull*, 85 Ill. 124; but the mere conveyance will not, *per se*, raise the presumption that the value of the lands is beyond that of the mortgage, and there may be circumstances which will give rise to the contrary presumption; thus where an assignee in bankruptcy conveys land of the bankrupt to the mortgagee thereof and the latter accepts the title, the presumption is that the land is worth less than the mortgage, for if it were worth more, it would be a breach of duty on the part of the assignee to convey it, even in satisfaction of the mortgage, and in such case there will be no merger, *Haggerty v. Byrne*, 75 Ind. 499.

An intent to keep alive a mortgage has been inferred even where at first sight all the attendant circumstances, except the matter of price, would seem to imply an extinguishment, where the interest of the mortgagee and equity have so required. Thus, in *Silliman v. Gammage*, 55 Tex. 365, the mortgagee in good faith took a conveyance of the mortgaged premises at a price which was fair, although less than the debt secured by it, and gave a surrender of the note, mortgage and balance of the indebtedness; before this last occurrence the land had been sold at sheriff's

sale and bought by a third person ; it was held that the mortgage was not merged, although the mortgagee had constructive notice of the sale.

Where the mortgagee takes a conveyance but retains the evidence of indebtedness, a merger should not, in the absence of other circumstances, be inferred. Thus, in *Boardman v. Larrabee*, 51 Conn. 39, the plaintiff, who held by assignment a mortgage note of the defendant, purchased, of a grantee of the defendant, the equity of redemption, and subsequently executed a release to the defendant ; the defendant claimed that the purchase of the equity had worked a merger, and that the rents should be accounted for and applied in reduction of the debt ; but the court held that there was no merger, PARDEE, J., saying : "The purchase of the equity was an investment which the plaintiff could make quite independently of his ownership of the note secured by the mortgage. He held his different interests in severance ; at last conveying one and retaining the other. The law will not force a merger upon him contrary both to his intent and interest ;" and see *Jarvis v. Frink*, 14 Ill. 396.

When the mortgagee buys in the land at sheriff's sale, and, before taking title, assigns the certificate, which entitles him to a sheriff's deed, to a third person, there will be no merger, *Reed v. Latson*, 15 Barb. 15. Apart from the question of intention, this position is sustainable on the ground that what had vested in the purchaser was a mere right.

It might well be thought that there could be no question whether a merger could take place when the mortgagee has assigned his mortgage, and afterwards taken a conveyance of the fee ; nevertheless the question has been raised and has been, as might have been expected, decided in the negative, *White v. Hampton*, 13 Iowa, 259 ; but in the case of *Mickles v. Townsend*, 18 N. Y. 575, it was held that where a grantor of the equity of redemption, who had conveyed with warranty, purchased the mortgage, and took an assignment thereof, the purchase would inure to the benefit of the grantee, and the mortgage would merge. From the opinion of the court, which was to the above effect, DENIO, J., dissented, and, while he regarded the purchase as inuring to the benefit of the grantee, held that it was by way of estoppel. In this position we are inclined to agree with the opinion of the learned dissentient, for at no time were the estate and the incumbrance in possession of the same person ; and, besides, if the question of intent is to go for anything, the taking of the assignment of the mortgage, instead of having satisfaction entered, showed an intent to keep alive the mortgage.

Where the amount of the mortgage, or a credit therefor, forms part of the price paid by the mortgagee on taking title, as it does where the purchase is expressly subject to the mortgage or when the payment of

the mortgage is assumed, then a merger, or, more strictly speaking, an extinguishment, will be worked. Thus, in *Kneeland v. Moore*, 138 Mass. 198, where the mortgagee took a deed, and assumed and was to pay the mortgage held by him, and also another, and was to hold the grantor harmless, a merger was held to have taken place; and so in *Dickason v. Williams*, 129 Mass. 182, where the general rule was announced that where the mortgage forms part of the purchase-money, and there is no intervening estate, the purchase by the mortgagee works a merger; and see *Lilly v. Palmer*, 51 Ill. 331, where the mortgage becoming part of the purchase-money, the mortgage, as against the mortgagor, was held merged in the hands of the owner of the fee; and see *Russell v. Pistor*, 3 Seld. 171. But it is to be remarked that it has been decided that a mere agreement in the deed that the grantor, the mortgagor, shall not be called upon to pay the mortgage, will not cause the implication that the conveyance was in satisfaction or in payment so as to work a merger, *Decatur v. Walker*, 137 Mass. 141. Indeed, in that case, HOLMES, J., said: "The cautious provision that the grantor should not be called upon to pay it looks the other way."

Fowler v. Fay, 62 Ill. 375, is a singular and somewhat exceptional case. The mortgagor took a conveyance of the land by deed, expressly making the conveyance subject to a junior mortgage; it was held by four Judges of the Supreme Court of Illinois (LAWRENCE, C. J., BREESE, THORNTON, and McALLISTER, JJ.) against three (WALKER, SCOTT, and SHELDON, JJ.) that as the mortgagee purchased without *assuming to pay* the junior mortgage, there was no merger, notwithstanding the land was taken expressly subject to the mortgage.

A merger will take place where, from the circumstances of the case, it becomes the duty of a mortgagee who takes title to the land mortgaged, subject to another mortgage or incumbrance, to pay both incumbrances. Thus in *Byington v. Fountain*, 61 Iowa, 512, on January 26, 1867, R. H. Paddock executed a mortgage to the Amana Society; on October 31 he conveyed the mortgaged premises to Clark and Boal by a conveyance which, by an accompanying bond, was shown to be mortgaged; on January 24, 1868, he conveyed to McAllister, who, on February 1, conveyed to the plaintiff; on April 29, 1869, Clark and Boal conveyed to Campbell, with a warranty against the Amana mortgage; in October the plaintiff took an assignment of the said mortgage, and in 1870 foreclosed it without notice to Campbell; on November 23, 1879, Campbell made a conveyance of the Clark and Boal mortgage, which eventually became vested in the defendant; in 1880 the land was sold, on execution, to the plaintiff and another. The court held that it was the duty of the

plaintiff, who succeeded to Paddock's liabilities, to pay both mortgages, and hence that his own was merged, citing *Vannice v. Bergen*, 16 Iowa, 555, DAY, C. J., saying: "As to the general proposition that if the mortgagee purchases the equity of redemption from the mortgagor the mortgage as well as the mortgage debt is extinguished, there is, of course, no doubt; for, ordinarily and legally, the effect of such an arrangement is to vest the mortgagee with the whole estate, and such an entire interest is inconsistent with his claim under the mortgage, *Wickersham v. Reeves*, 1 Iowa, 413. If, however, it was the intention to keep the mortgage alive—if it is to the interest of the mortgagee, and it can be done without prejudice to the rights of third persons—the doctrine of merger as to them will not apply, see also *Rankin v. Wilsey*, 17 Iowa, 463; *First National Bank of Waterloo v. Elmore*, 52 Iowa, 541; *Woodward v. Davis et al.*, 53 Iowa, 694. The intent to keep the mortgage alive will avail, however, only when it can be done without prejudice to the rights of third parties. As against the plaintiff the holders of the Clark and Boal mortgage have a right to have their mortgage satisfied out of the property in controversy. It is apparent that they will or may be deprived of this right if they are compelled to redeem the Amana mortgage. It is not competent for the plaintiff to purchase the Amana mortgage and assert it in such manner as to prejudice the rights of the holders of the Clark and Boal mortgage or deprive them of their right to have their debt satisfied out of the land."

The entry of satisfaction of the mortgage, in pursuance of an agreement that such entry should be made, is evidence of an intent to merge; and when the clear intent is to that effect, the merger may be enforced, although it is to the disadvantage of the mortgagee who has purchased the fee. Thus in *Campbell v. Carter*, 14 Ill. 286, Farwell held notes of Brush and a mortgage to secure them. He recovered judgment. Brush then proposed to make an absolute conveyance, with release of dower, in satisfaction. The offer was accepted and a deed in accordance therewith delivered. Satisfaction of the mortgage was entered. The mortgage was held merged, although at the time of taking title the land was bound by judgments of which Farwell had not *actual* knowledge, TREAT, C. J., saying: "He [Farwell] intended to discharge the incumbrance and rely exclusively upon the title acquired by the deed. If he designed to keep the incumbrance on foot, why did he discharge of record the judgment rendered on the mortgage? . . . It is not pretended that there was any mistake in the entry of satisfaction." But where the conveyance or acts which are relied upon to produce a merger have been procured by fraud, or by concealment of their legal effect from a person who can hardly be expected to be familiar with it, equity will refuse to enforce the merger. Thus in *Ann Arbor*

Savings Bank v. Webb, 56 Mich. 377, Nancy M. Beebe executed a mortgage to her mother, Mrs. Webb, and subsequently, in payment of a debt due to the Ann Arbor Savings Bank, conveyed the land mortgaged to the cashier of the said bank, one Hiscock, receiving from him a deed of defeazance, which was not recorded. The bank then proposed that Mrs. Beebe and Hiscock should each give to Mrs. Webb a warranty deed for the land, and that Mrs. Webb should give a note for Mrs. Beebe's indebtedness, and a mortgage to secure the same, to the bank. The papers were prepared by the bank and its attorney (Mrs. Webb having no counsel) and were executed and delivered, Mrs. Beebe's deed before, and Hiscock's after, Mrs. Webb had executed and delivered the mortgage. The legal effect of this, of course, was to give the bank a first lien and merge to Mrs. Webb's mortgage. On a bill for a foreclosure and cross bill, the court refused to allow the merger. CHAMPLIN, J., in delivering the opinion, said: "Under all the circumstances the bank must be held responsible for any misrepresentations which were made to Mrs. Webb in procuring her signature. The indirect manner in which it was proposed by the bank officials to obtain this priority raises a strong presumption that they did not expect that Mrs. Webb would be willing to discharge her mortgage, or make it subject to the indebtedness of the bank, if informed of the position in direct terms. Few persons unlearned in the law are acquainted with the doctrine or effect of merger. The course pursued to obtain priority was well calculated, if it was not designed, to entrap a person in the situation in which Mrs. Webb was placed."

A practical merger is brought about where the owner of a senior mortgage buys the land of the mortgagor and sells it for a sum sufficient to discharge all incumbrances. In such case, unless other equities intervene, the action will be regarded as a foreclosure; and if the junior mortgagee attempt subsequently to foreclose, the former mortgage cannot be set up in preference to his claim. This was held in *Webb v. Meloy*, 32 Wisc. 319, in which case LYON, J., in delivering the opinion of the court, said: "No reason or justice is perceived in keeping alive the prior incumbrances for the benefit of Meloy after he has received the full amount of them, and sufficient to repay the sum paid for the equity of redemption and to pay the plaintiff's mortgage by his sale to Blain; and inasmuch as there is no claim or pretence that Meloy is not pecuniarily responsible, and fully able to respond in damages for any breach of his covenant in his conveyance to Blain, there seems to be no good reason why the prior incumbrance should be kept alive for the benefit of Blain."

In this connection it may be noted that the rule of equity—that where a mortgagor has sold parcels of his land covered by the mortgage the

mortgage must be first satisfied out of the parcels remaining in the hands of the mortgagor, and then out of the others in the inverse order of their purchase—when enforced against the land purchased by the mortgagee has the effect of a *quasi merger*, *Skeel v. Spraker*, 8 Paige, 185.

At what time Intent to Merge or to keep Alive must be Manifested.

The question has arisen, *when*, in cases in which the merger or non-merger depends on intent, must the intent be manifested. Chancellor KENT seems to have been of opinion that unless the beneficial interest relied upon to prevent a merger existed at the time of the union of the two estates or rights, or the intent to keep alive both interests were "immediately and duly declared," merger would take place, *Starr v. Ellis*, 6 Johns. Ch. 393; and the language of KENNEDY, J., in *Koops v. Hartman*, 7 Watts, 20, as follows: "Being the owner of the judgment, when he bought the land from Snell, the defendant in the judgment, the lien of the judgment thereby became extinct through the operation of law; there being no agreement made or intention manifested at the time, to continue it for any purpose whatever," would seem to support the learned Chancellor's view; but in spite of these two eminent names the rule as stated does not seem to be the law. Of course if a positive intent to merge be apparent at the time of the meeting of the two interests in the same person, it may be too late afterwards to revive what is drowned, *Hatch v. Kimball*, 16 Me. 146; but unless there be such positive intent apparent, the better rule seems to be that the law will not be confined in its determination of the question to the consideration of the moment of merger, but may consider the intent as held in suspense, until the rights of a third person require an absolute fixation of intention. In *James v. Morey*, 2 Cow. 246, where the question was very fully and learnedly considered, WOODWORTH, J., said: "If the question is to be decided by intent, express or implied, when does it become fixed and unchanged? Certainly not until some one acquires an interest and thereby obtains a right to draw it in question. It would be novel in principle, I apprehend without precedent in any book of authority, that a stranger should urge, 'you once declared the mortgage was merged and although at the time it was indifferent to all the world, in what manner you treated it, you are bound by the election,'" and SUTHERLAND, J., after quoting Kent, and examining the circumstances of *Starr v. Ellis*, said: "The observation of the Chancellor therefore, 'that the intention to keep up the charge must be immediately declared,' comes to us with a diminished weight of authority. He must

have perceived that the question of fraud controlled the case, and perceiving that, it is not disrespectful to him to suppose that he gave to the other features of the case a consideration less laborious and profound than he otherwise would have done. In questioning the correctness of that position, therefore, I consider myself as combating the impression merely, and not the authority of the Chancellor. But there was in truth in that case a lapse of fourteen months between the purchase of the mortgage by Samuel Ellis, and the assignment to his son. And if the case had turned upon the question of merger, all that would have been decided by it, is that if the party in whom the legal and equitable estates unite, does not within fourteen months declare his intention, that they shall or shall not remain distinct, the law will presume his intention from the circumstances of the case. To establish the rule that the intention of the party shall be immediately declared or the law shall declare it for him, would be virtually to take from him the privilege of an election. How is he to make his intention known except by his acts in relation to the property which is the subject of the charge? Is not a reasonable time then to be allowed him? Is he to be compelled immediately to assign the charge if he intend to keep it distinct, or to sell the fee if he intend the charge shall merge?"

An examination of *Koons v. Hartman* will show that it, as little as *Starr v. Ellis*, necessarily decided that intention must be immediately declared. On January 5, 1818, John Snell, conveyed land to Jacob K. Boyer, who held a judgment upon it amounting to \$360, the consideration of the deed was \$8000. On March 23, 1819, J. K. Boyer, by his deed conveyed the land in fee *clear of all incumbrances*, to F. Weitzell, who, on May 30, 1820, conveyed to others, from whom the defendant derived title; some thirteen months after the deed to F. Weitzell, J. K. Boyer marked the judgment against Snell, to the use of Isaac Boyer, who issued execution and sold the land. The court held that the judgment had merged, and that the purchaser at sheriff's sale took no title. The justice of this decision no one can question, but it was not necessary for the court to hold that a declaration of intention must have been made at the time J. K. Boyer took title in order to keep the judgment alive, for his subsequent sale to Weitzell, expressed to be clear of all incumbrance, was an express declaration that the judgment had merged, and, title having been taken on the faith of such declaration, the rights of third persons had attached, the time had arrived when Boyer could not change or hold in suspense his mind without injury to third persons, and, consequently, the facts bring the case within the rule announced in *James v. Morey*, and entitle us to treat Mr. Justice KENNEDY's remarks as *obiter dicta* merely. The rule of *James v. Morey* is certainly in accord with sound reason, and

is abundantly supported by authority; see *Rankin v. Wilsey*, 17 Iowa, 463, where the court says: "His intention whether expressed or implied, need not become fixed and unchangeable, until some one acquires an interest and thereby obtains a right to draw it in question, and until some person acquired an interest he was at liberty to consider the pledge merged or not, as might be most beneficial to him," and see *Smith v. Roberts*, 91 N. Y. 470; *Goodwin v. Keney*, 47 Conn. 486.

Evidence to show Intent.

As a consequence of this rule, actions of the owner, subsequent to the union of titles and prior to the acquirement of rights by third persons, may be given in evidence to determine the intent, *Sheehan v. Hamilton*, 4 Abb. App. 211; *Smith v. Roberts*, *supra*. Thus, an assignment of a mortgage within a reasonable time shows an intent to keep it alive, *Goodwin v. Keney*, *supra*.

Estoppel to deny Apparent Intent.

A person may so act that, no matter what has been his real intention, he will be estopped from denying his apparent intention with reference to a merger; thus one who has treated a mortgage as valid, and so transferred it, is estopped, as against the assignee or one claiming under him, from setting up that it has merged, *Powell v. Smith*, 30 Mich. 451; and so will also be estopped a purchaser of the fee who takes after the assignment of the mortgage has been recorded, *Id.*

Merger may be *Pro Tanto*.

A merger may be *pro tanto*—this, which was doubted by Chancellor Kent, *James v. Johnson*, 6 Johns. Ch. R. 426, is now well-established law, *James v. Morey*, 2 Cow. 246; *Casey v. Buttolph*, 12 Barb. 637; *Jenkins v. Van Schaack*, 3 Paige, 242; *Lansing v. Pine*, 4 Id. 639; *Knickerbacker v. Boutwell*, 2 Sand. Ch. 319; *Den ex d. Wills v. Cooper*, 25 N. J. Law, 137; *Duffy v. McGuiness*, 13 R. I. 595; *Trimmier v. Vise*, 17 S. C. 499; *Wilhelmi v. Leonard*, 13 Iowa, 330; *Colton v. Colton*, 3 Phila. 24; *Grover v. Thatcher*, 4 Gray, 526; *Wyman v. Hooper*, 2 Id. 141; *Hill v. Reno*, 112 Ill. 154. Thus, where there are several tracts subject to a mortgage and the mortgagee purchases one, the mortgage will merge as to the one purchased and to the extent of its proportionate value, but not as to the rest, *Trimmier v. Vise*, *supra*; *Colton v. Colton*, 3 Phila. 24; and see *Fisher v. Clyde*, 1 W. & S. 544; so where

a mortgage upon several lots is assigned to the owner of one of them, *Knickerbacker v. Boutwell, supra*; or where the mortgagee becomes the devisee of an undivided portion of the mortgaged premises, *Sahler v. Signer*, 44 Barb. 606; or where an undivided portion of the premises descends to the mortgagee, *Thebaud v. Hollister*, 37 N. J. Eq. 402; or where an undivided portion of the land charged with an annuity descends to the annuitant, *Addams v. Heffernan*, 9 Watts, 529; *Jenkins v. Van Schaak, supra*; and so where the lessee of lands purchases a moiety of the rent and of the reversion, *Lansing v. Pine*, 4 Paige, 639; and see *Philips v. Clarkson*, 3 Yeates, 124; *Spencer v. Austin*, 38 Vt. 258; *Fox v. Long*, 8 Bush, 551.

Merger may be as to Certain Persons Only.

A merger may take place with reference to certain persons and the two estates or interests may yet be kept distinct with reference to other persons. Thus in *Den ex d. Wills v. Cooper*, 25 N. J. Law, 137, the *cestui que trust* of one-third of an estate became trustee through the descent of the trust upon him. The court said: "Even though the other *cestui que trustent* have a contingent interest in the whole tract, this, it seems, would not prevent a merger; for as against one person the estate may be merged, while as against another it may have a continuance in point of title, which happens as often as some third person has a contingent interest under the lesser estate, *Prest. Merg.* 39."

In *Hancock v. Fleming*, 103 Ind. 533, Jane Fleming acquired land subject to a judgment, she afterwards executed a mortgage to Hancock, and still later, with her husband, conveyed the land, expressly subject to the mortgage, to Kelsey and Wood; execution having been issued on the judgment, Kelsey bought the land. On a suit for foreclosure by Hancock, it was held that as to Hancock the title acquired through the judgment had merged in the title by conveyance, so that the mortgage could not be cut out, but that as against others the judgment lien might be kept alive to protect Kelsey against incumbrances or titles subsequent thereto, for equity would not allow him to get rid of the mortgage expressly subject to which he took, but would not allow the recital of subjection to have more effect than was intended.

Merger brought about by Fraudulent Deed destroyed when Deed is Set Aside.

Where a deed is made to the owner of an incumbrance under such circumstances that, were the deed in good faith, a merger would take place,

and the deed is set aside as fraudulent, there will be no such merger as will destroy the incumbrance, *Roberts ads. Jackson ex d. Webb*, 1 Wend. 478; *First National Bank of Lebanon v. Essex*, 84 Ind. 144; or the dower of the wife of the grantor, where the fraudulent deed has released dower, *Malloney v. Horan*, 49 N. Y. 111; and the merger will be prevented or set aside where the fraudulent grantee takes from the prior mortgagee a deed of quitclaim, although the deed contain the words—“which mortgage is hereby cancelled and discharged, the grantor having recently conveyed his interest on the premises to the grantee” for *cessante ratio cessat et lex*, and the conveyance having failed, the release or quitclaim based thereon falls also, *Crosby v. Taylor*, 15 Gray, 64.

Devises and Dedications to Charities—Mortmain.

FRANCIS FENEYLON VIDAL, JOHN F. GIRARD, AND OTHERS, Citizens and Subjects of the Monarchy of France, AND HENRY STUMP, Complainants and Appellants, *v.* THE MAYOR, ALDERMEN AND CITIZENS OF PHILADELPHIA, THE EXECUTORS OF STEPHEN GIRARD, AND OTHERS, Defendants.

Supreme Court of the United States, January Term, 1844.

[Reported in 2 Howard, 127.]

The corporation of the city of Philadelphia has power, under its charter, to take real and personal estate by deed, and also by devise, inasmuch as the Act of 32 and 34 Henry 8, which excepts corporations from taking by devise, is not in force in Pennsylvania.

Where a corporation has this power, it may also take and hold property in trust in the same manner and to the same extent that a private person may do: if the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compellable to execute it, but the trust (if otherwise unexceptionable) will not be void, and a Court of Equity will appoint a new trustee to enforce and perfect the objects of the trust.

Neither is there any positive objection in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.

Under the general power "for the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry, and happiness," the corporation may execute any trust germane to those objects.

The charter of the city invests the corporation with powers and rights to take property upon trust, for charitable purposes, which are not otherwise obnoxious to legal animadversion.

The two Acts of March and April, 1832, passed by the legislature of Pennsylvania, are a legislative interpretation of the charter of Philadelphia, and would be sufficient hereafter to estop the legislature from contesting the competency of the corporation to take the property and execute the trusts.

If the trusts were in themselves valid, but the corporation incompetent to execute them, the heirs of the devisor could not take advantage of such inability; it could only be done by the State in its sovereign capacity, by *a quo warranto* or other proper judicial proceeding.

The trusts mentioned in the will of Stephen Girard are of an eleemosynary nature, and charitable uses, in a judicial sense. Donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law.

The decision of the Supreme Court of Pennsylvania in the case of *Zimmerman v. Andres*, (January Term, 1844,) recognized and confirmed, viz. : "That the conservative provisions of the statute of 43 Elizabeth, chap. 4, have been in force in Pennsylvania by common usage and constitutional recognition, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it."

The present case distinguished from the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, upon two grounds, viz. :

1. That the case in Wheaton arose under the law of Virginia, in which State the statute of 43 Elizabeth, chap. 4, had been expressly and entirely abolished by the legislature, so that no aid whatever could be derived from its provisions to sustain the bequest.
2. That the donees were an unincorporated association which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries were also uncertain and indefinite.

The decisions and *dicta* of the English judges, and the recent publication of the Record Commissioners in England, examined as to the jurisdiction of chancery over charitable devises anterior to the statute of 43 Elizabeth.

This part of the common law was in force in Pennsylvania, although no court having equity powers now exists or has existed, capable of enforcing such trusts.

The exclusion of all ecclesiastics, missionaries, and ministers of any sort from holding or exercising any station or duty in a college, or even visiting the same ; or the limitation of the instruction to be given to the scholars, to pure morality, general benevolence, a love of truth, sobriety, and industry ; are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void, according to the constitution and laws of Pennsylvania.

THIS case came up by appeal from the Circuit Court of the United States, sitting as a Court of Equity, for the Eastern District of Pennsylvania.

The object of the bill filed in the court below was to set aside a part of the will of the late Stephen Girard, under the following circumstances :—

Girard, a native of France, was born about the middle of the last century. Shortly before the Declaration of Independence he came to the United States, and before the peace of 1783 was a resident of the

city of Philadelphia, where he died in December, 1831, a widower and without issue. Besides some real estate of small value near Bordeaux, he was, at his death, the owner of real estate in this country which had cost him upwards of \$1,700,000, and of personal property worth not less than \$5,000,000. His nearest collateral relations were, a brother, one of the original complainants, a niece, the other complainant, who was the only issue of a deceased sister, and three nieces who were defendants, the daughters of a deceased brother.

The will of Mr. Girard, with two codicils, was proved at Philadelphia on 31st of December, 1831.

After sundry legacies and devises of real property to various persons and corporations, the will proceeds thus:—

XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds: and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior. Now, I do give, devise, and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate (the real estate in Pennsylvania charged aforesaid) unto "the Mayor, Aldermen, and Citizens of Philadelphia," their successors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same, that is to say: so far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen, and citizens of Philadelphia, or their successors, but the same shall for ever thereafter be let from time to time, to good tenants, at yearly, or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied towards keeping

that part of the said real estate situate in the city and liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same, whenever necessary, by erecting new buildings, and that the net residue (after paying the several annuities hereinbefore provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: and so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, for ever), a permanent college, with suitable outbuildings, sufficiently spacious for the residence and accommodations of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design.

The said college shall be constructed with the most durable materials, and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength, convenience, and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles. It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice. It shall be fire-proof inside and outside. The floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows, and shutters. Cellars shall be made under the whole building, solely for the purpose of the institution, etc.,

etc. (and then follows a long and exceedingly minute description of the manner in which the building shall be erected).

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution, the income, issues, and profits of so much of the said sum of two millions of dollars as shall remain unexpended, shall be applied to maintain the said college according to my directions.

1.. The institution shall be organized as soon as practicable, and to accomplish that purpose more effectually, due public notice of the intended opening of the college shall be given, so that there may be an opportunity to make selections of competent instructors and other agents, and those who may have the charge of orphans may be aware of the provision intended for them.

2. A competent number of instructors, teachers, assistants, and other necessary agents, shall be selected, and when needful, their places from time to time supplied. They shall receive adequate compensation for their services ; but no person shall be employed who shall not be of tried skill in his or her proper department, of established moral character, and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible ; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars useful to be known of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian or other competent authority shall have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors, or others by them appointed, to enforce, in relation to such orphan, every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times, priority of application shall entitle the applicant to preference in admission, all other things concurring; but if there shall be, at any time, more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given—first, to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York, (that being the first port on the continent of North America at which I arrived;) and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part-owner of a vessel and cargo.

7. The orphans admitted into the college shall be there fed with plain but wholesome food, clothed with plain but decent apparel, (no distinctive dress ever to be worn,) and lodged in a plain but safe manner: due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Greek and Latin languages)—and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans admitted into the college shall, from mal-conduct, have become unfit companions for the rest, and mild means of reformation prove abortive, they should no longer remain therein.

9. Those scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the mayor, aldermen, and citizens of Philadelphia, or under their direction, to suitable occupations—as

those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively, consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the mayor, aldermen, and citizens of Philadelphia, and their successors; and I do so with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow-citizens of Philadelphia will observe and evince especial care and anxiety in selecting members for their city councils, and other agents.

There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely:—First, I enjoin and require, that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of or pledged to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively: Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth,

sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

If the income arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the increase in the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings, and the maintenance and education of such further number of orphans as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund, hereinafter expressly referred to, for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation Company—my design and desire being that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say—(then follows an enumeration of the objects to which the income of the fund is to be applied, being the improvement of the eastern part of the city.)

XXIII. I give and bequeath to the commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purpose of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect the several improvements above specified, namely : 1. Laws, to cause Delaware Avenue, as above described, to be made, paved, curbed, and lighted ; to cause the buildings, fences, and other obstructions now existing, to be abated and removed, and to prohibit the creation of any such obstructions to the eastward of said Delaware Avenue ; 2. Laws, to cause all wooden buildings, as above described, to be removed, and to prohibit their future erection within the limits of the city of Philadelphia ; 3. Laws,

providing for the gradual widening, regulating, paving, and curbing Water Street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water and pumps, as before specified—all which objects may, I persuade myself, be accomplished on principles at once just in relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interests and income thereof from time to time, so that the whole shall form a permanent fund, and to apply the income of the said fund:

1st. To the further improvement and maintenance of the aforesaid college, as directed in the last paragraph of the XXIst clause of this will.

2d. To enable the corporation of the city of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited to the purpose; and to this end I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station, patrol together.

3d. To enable the said corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are least able to bear it.

To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year forever, after providing for the college as hereinbefore directed, as my primary object. But if the said city shall knowingly and wilfully violate any of the conditions hereinbefore and hereafter mentioned, then I give and bequeath the said remainder and accumulations to the commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues, and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the XXIst clause of this will: And if the

commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to the mayor, aldermen, and citizens of Philadelphia are made upon the following express conditions, that is to say: First. That none of the moneys, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever, than those herein mentioned and appointed. Second. That separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college, and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature, as hereinafter mentioned, that my intentions had been fully complied with. Third. That the said corporation render a detailed account annually, in duplicate, to the legislature of the commonwealth of Pennsylvania, at the commencement of the session, one copy for the Senate, and the other for the House of Representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said college, and shall submit all their books, papers, and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required.

Fourth. That said corporation shall also cause to be published in the month of January, annually, in two or more newspapers, printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

(The 25th section related to the winding up of the Girard Bank, and the 26th appointed Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay, Executors. Then followed the execution of the will, in regular form, on the 16th day of February, 1830.)

Whereas, I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February, eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will: Now, I do hereby republish the foregoing last will and testament, dated February 16, 1830, and do confirm the same in all particulars.

In witness, I, the said Stephen Girard, set my hand and seal hereunto the twenty-fifth day of December, eighteen hundred and thirty.

STEPHEN GIRARD. [L. s.]

Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator and of each other, December 25, 1830.

JOHN H. IRWIN,

SAMUEL ARTHUR,

JNO. THOMSON.

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township: Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia,

shall be built upon the estate, so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to the said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes, as are declared in section twenty of my will, it being my intention, that the said square of ground shall be built upon, and improved in such a manner, as to secure a safe and permanent income for the purposes stated in said twentieth section.

In witness whereof, I, the said Stephen Girard, set my hand and seal hereunto, the twentieth day of June, eighteen hundred and thirty-one.

STEPHEN GIRARD. [L. S.]

Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, and a further direction in relation to the real estate therein mentioned, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and of each other, June 20, 1831.

S. H. CARPENTER,

L. BARDIN,

SAMUEL ARTHUR.

The executors named in the will, duly proved the same with the codicils before the register of wills for the city and county of Philadelphia, obtained letters testamentary thereon, and took upon themselves the burden of the execution thereof. Inventories and supplementary inventories of the estate were filed, debts and legacies paid, and large sums of money paid to the residuary legatees. The accounts of the executors were filed in the office of the register of wills, from which they passed, in due course of legal proceedings to the Orphans' Court, for the city and county of Philadelphia.

An act of the legislature of Pennsylvania, of 24th March, 1832, "To enable the Mayor, Aldermen, and Citizens of Philadelphia to carry into effect certain improvements, and to execute certain trusts,"

recites the bequest of \$500,000, in Stephen Girard's will, sect. 22, to the mayor, aldermen, and citizens of Philadelphia, in trust, &c., and "for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia, aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws." Sections 1 to 9 contain enactments stipulated by the testator in sect. 23 of the will, as the condition on which \$300,000 was bequeathed to the commonwealth of Pennsylvania.

"And forasmuch as in the course of time it may appear that powers are not vested in the said, the mayor, aldermen, and citizens of Philadelphia, which may be yet required, to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

"Sect. 10. Be it further, &c., That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution, of any and all the devises and bequests, trusts and provisions, contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

"Sect. 11. And be it further, &c., That no road or street shall be laid out or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved of by a majority of the Select and Common Councils of the city of Philadelphia."

By another act, passed on the 4th of April, 1832, entitled "A supplement to the act entitled 'An act to enable the Mayor, Aldermen, and Citizens of Philadelphia, to carry into effect certain improvements, and to execute certain trusts'" the Select and Common Councils of the

city of Philadelphia, are authorized to provide by ordinance, or otherwise, for the election or appointment of such officers or agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard.

In October, 1836, some of the heirs of Stephen Girard filed a bill upon the equity side of the Circuit Court of the United States for the Eastern District of Pennsylvania, against the corporation of Philadelphia, the executors, and some of the nieces of Girard, who were made co-defendants. The claim, as presented in the original bill, amended bill, and bill of revivor (in which Henry Stump is made a party as administrator of one of the deceased complainants,) is as follows:—

“ Your orator and oratrix further show, that amongst other things in their original bill, they have alleged and charged that the testator, Stephen Girard, by a supposed devise in his last will and testament, has in the first place appropriated two millions of dollars to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of a college, for the maintenance and education of a class of orphans, attempted to be described by the said testator in his will.

“ And your orator and oratrix further state, that in their original bill, they set out that the said testator, in and by his will, after appropriating the two millions of dollars as aforesaid, by another supposed devise, dedicated the whole of the residuum of his real and personal estate, with certain exceptions mentioned in the said original bill, to the mayor, aldermen, and citizens of Philadelphia, in trust, for the progressive enlargement of said college, and that there are no other limitations to the number of orphans to be ultimately admitted into the said college, nor to the cost nor extent of the establishment, but the number and extent of the collegiate buildings and their appendages, that may from time to time be erected within the entire area of forty-five acres and some perches of land, being a country-seat called Peel Hall; so that in effect there is no devise over of any part of the said residuum of the real and personal estate of the testator, to any other use, purpose, or object, after deducting the appropriations that are accepted in the original bill, than the charity connected with the establishment of said college, except it be contingently, in case the said college establishment be not made, as it is contemplated to be, capable of absorbing the whole of the said residuum of the real and personal estate, intended to be devised in trust as aforesaid, as by a reference to

the said original bill and exhibits, which your complainants pray may be taken as part of this bill, will more fully appear.

"Your complainants suggest and insist to be available, that it will be decided, from a true exposition and construction of said will, which is submitted to the Court, that it was the intention of the testator to dedicate the whole of the rents, issues, and profits of his real estate in the city and county of Philadelphia, in trust, exclusively to the uses and purposes of the charity connected with said college, and not that the said real estate, or the rents, issues, and profits thereof are to be contingently applied to any other use or purpose, unless it be to the payment of a ratable proportion of certain annuities charged on the real estate of the testator, in the state of Pennsylvania, by the eighteenth clause in his will.

"And your orator and oratrix further aver and expressly charge, that the charity connected with the college, if the establishment is erected and managed according to the directions of the testator, and the necessary buildings constructed so as to fill up and improve the whole area of forty-five acres and some perches of land, will require and consume the whole of the residuum of his real and personal estate, attempted to be devised as aforesaid for the purpose of erecting, progressively enlarging, and perpetually maintaining said collegiate establishment, for the support and education of as great a number of orphans as the testator directs to be admitted therein, so that there will be no surplus of said residuum of his real and personal estate supposed to be devised in trust as aforesaid, to be appropriated to any other objects or purposes designated by the testator in his will. And your orator and oratrix aver, that there is no devise over for any other purpose, upon any contingency, of the said two millions of dollars, supposed to be devised to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of said college, and that no part of said two millions of dollars, according to the will of the testator, can be applied in any event to any other use, purpose, or object, except to the charitable objects depending upon the erection, endowment, and perpetual support of said college. And your orator and oratrix aver and insist to be available, that the said supposed devise of two millions of dollars to the mayor, aldermen, and citizens of Philadelphia, in trust, for the erection and endowment of said college, for the benefits of uncertain objects of charity, supposed to be intended by the testator, is void.

"And your complainants maintain, that the mayor, aldermen, and citizens of Philadelphia, were, at the death of the testator, incapable of executing any such trust, or of taking and holding a legal estate for the benefit of others; and that whatever may be the capacity of said mayor, aldermen, and citizens of Philadelphia, to hold property for the use of others, or to execute a trust, the object for whose benefit the said devise in trust is supposed to have been made, are indefinite, vague, and uncertain, as will appear from an examination of said will; so that no trust is created that is capable of being executed, or is cognizable either at law or in equity, and no estate passed by said supposed devise, that can vest in any existing or ascertainable *cestuis que trust*; that if the objects or persons for whose benefit the said devise is supposed to have been made, were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession, so that the said two millions of dollars, for want of a good and effectual devise, has descended by operation of the law governing descents in the state of Pennsylvania, and the treaty stipulations between France and the United States, to the heirs-at-law of Stephen Girard the testator, according as such laws and treaty stipulations affect the rights of such of the heirs as are aliens and such as are citizens of the United States.

"Your orator and oratrix expressly charge in their original bill, that the said supposed devise to the mayor, aldermen, and citizens of Philadelphia, in trust, of the whole of the *residuum* of the real and personal estate of the testator for the erection, progressive enlargement, and perpetual support of said college, is void, and that your complainants were heirs-at-law of said testator, and each entitled to one-third part of the estate of the testator, undisposed of or ineffectually disposed of by his last will, according to the law governing descents in the state of Pennsylvania, and the treaty stipulations between France and the United States; and that the testator at the time of his death left certain other heirs, namely, Maria Antoinetta, wife of John Hemphill, Henrietta, wife of John Y. Clark, and Caroline, wife of John Haslam, which said Maria, Henrietta, and Caroline, are nieces of the said testator, and daughters of John Girard, late of Philadelphia, deceased, and they and their husbands, except the husband of said Caroline, are all made defendants to said bill, together with Mark Richards, who is the trustee of Caroline, all of which said defendants are citizens of the state of Penn-

sylvania. And your orator and oratrix further allege that the last named heirs are the only persons entitled besides your complainants to any part of the real or personal estate of which the said testator died seized or possessed, and which remained undisposed of or ineffectually devised by his will.

"And your complainants, as they are informed, verily believe and expressly charge, that notwithstanding the invalidity of said supposed devise or devises in trust, the said mayor, aldermen, and citizens of Philadelphia, soon after the death of the testator, entered upon and possessed themselves of the two millions of dollars, supposed to be devised to them in trust for the erection and support of said college, and also of the whole of the *residuum* of the real and personal estate of the testator, supposed to be devised to them for the same purposes, and have ever since continued to hold and manage the same according to the terms of said supposed trust, or under the pretext of applying the said two millions of dollars, and the said *residuum* of the real and personal estate of the testator, to the supposed objects and purposes of said trust; that they have altogether refused to account to your complainants or to pay over to them any part of their distributive shares, either of the said two millions of dollars or of the *residuum* of the real and personal estate, to which they are entitled, but intending artfully and fraudulently to evade and baffle the reasonable and just claims of your complainants, and the relief prayed for in the original bill, they have neglected to answer fully, either as to the amount or value of the real or personal estate they have entered upon or received from the estate of the testator, under color of said trust; and your complainants pray that in order to obtain the relief and equity prayed for, the said mayor, aldermen, and citizens of Philadelphia, be compelled to answer and discover," &c. &c.

[The bill then prayed a general discovery and account from all parties.]

The defendants all answered, and the executors filed full accounts of all their transactions. A commission to take testimony was issued to France, in order to establish the relationship existing between the complainants and the deceased.

Under the Act of 1832, the corporation of Philadelphia passed an ordinance providing for the building of the college, and the board of trustees created thereby was organized in March, 1833. The building

was commenced and carried on from year to year under the direction of the authorities appointed in this ordinance.

On the 28th of April, 1841, the cause came on for hearing in the Circuit Court upon the bill, amended bill, and bill of revivor, answers, replication, depositions, and exhibits, when, after argument of counsel, it was ordered, adjudged, and decreed, that the complainants' bill be dismissed with costs.

The complainants appealed to this court.

Jones and *Webster*, for the appellants, who were also the complainants below.

Binney and *Sargeant*, for the defendants.

Jones made the three following points:—

1. That the bequest of the college fund is to this amount void, by reason of the uncertainty of the designation of the beneficiaries or *cestuis que trusts* of the legacy.

2. That the corporation of the city of Philadelphia is not authorized by its charter to administer the trusts of this legacy, and that the intentions of the testator would be defeated by the substitution of any other trustee.

3. That if otherwise capable of taking effect, the trust would be void, because the plan of education proposed is anti-christian, and therefore repugnant to the law of Pennsylvania, and is also opposed to the provision of Art. IX. sec. iii. of the constitution of Pennsylvania, that "no human authority can in any case whatever control or interfere with the rights of conscience."

If the first point should be established and the second not, the corporation would become trustees for the complainants. 8 Pet. 326; *King v. Mitchell*, 1 Meriv. 336; 2 N. C. 557; 2 Dev. 309; 10 Ves. 535.

The city of Philadelphia claims as a residuary legatee, even if the trust should be declared void, but there are two answers to this, first, that a trust bars the residuary interest, and, second, that the *residuum* is divided into parts. Ambl. 580; 1 Johns. 571.

In real estate, the residuary devisee never had a lapsed devise.

The bequest of the college fund is void by reason of the uncertainty of the *cestuis que trusts*.

At common law and prior to the statute 43 Elizabeth, such devises

were void, and that statute is not in force in Pennsylvania. Duke, 125; Delford on Mortmain, 43.

The statute 5 Elizabeth, reviving a statute of Henry VIII., says, henceforth it shall be lawful, &c., implying that it was not lawful before.

In England formerly all charities were under the care of the ecclesiastical courts. At the Reformation they were withdrawn from the church, and paupers thrown upon the public. Henry VIII. was glad to find some other way of supporting them, and Elizabeth encouraged private persons to found charities with the same view. But since her day, the source of the power which chancery has exercised over charities in England has been the prerogative of the crown, and this prerogative law never could have been introduced into the colonies. Jurisdiction over the three subjects of lunatics, infants, and charities, has always gone together, and been claimed because the king is said to be *parens patriæ*. 1 Blackst. Com. 303; 3 Id. 47.

The king, in his judicial capacity, through the chancellor, and exercising an extraordinary jurisdiction, takes control of these things. 3 Blackst. Com. 427; 1 Fonblanque, 57, note; 2 Id. 207, 235; Shepherd on Wills, 208; Chitty's Prerogative Law, 155, 161; 2 Atk. 553, where Lord HARDWICKE says it is a personal authority of the chancellor.

The jurisdiction over charities is not within the ordinary powers of equity, but falls back upon the king's prerogative. Sir Francis More, 188; Hob. 138; 13 Ves. 248.

It must be an extra-judicial function to set aside a will. How could this power have passed over to a revolutionized and republican state? In England, if the chancellor could not entertain jurisdiction, he referred the case to the king, who acted under his sign manual, but to whom can an American chancellor refer it? In an elective republic it is impossible to have such a person. These vague charities cannot be sustained unless by virtue of some peculiar law, and it is an alarming event that two millions of property are put into perpetual mortmain for the benefit of persons not even incorporated, not even a religious or mechanical society.

The municipal law of Pennsylvania consists of the law of nations, the common law of England, and some of the British statutes. The report of the judges made to the legislature in 1808 (3 Binn. 620), says that parts of the statutes 7 Edward I.; 13 Edward I.; 15 Richard,

II.; and 23 Henry VIII., commonly called statutes of mortmain, are in force in the state. 1 Dall. 67, 79, 444, 114.

The old remedy of assize was revived because the statute of Edward was considered to be in force in consequence of the report. 17 Serg. & R. 174. The preface to the report says it was necessary to examine the whole code. But the statute of Elizabeth is not included amongst those in force. How then can it get in, unless by some act of the legislature, which is not contended?

If the statute was in affirmance of the common law, the judges would have reported it as being in operation, because the common law was itself in force. 9 Serg. & R. 348, 349.

The first constitution of Pennsylvania, art. 7; art. 3, sect. 3, and 24 sect. (1 Dallas's Laws, Appendix), show that there is no power provided to carry out the king's prerogative.

[*Mr. Jones* then went into a minute and critical examination of the colonial records of Pennsylvania, to show that from the proceedings of the governor and assembly it was not believed that a power existed to sustain these religious charities, referring amongst other matters to the charter of the Presbyterian Church in 1772.]

After the Revolution, the first case that occurred to test these principles was 17 Serg. & R. 88, *Witman v. Lex*; but the bequests in this case were good by the common law without the aid of the statute of Elizabeth, which was decided not to be in force.

2. As to the capacity of the trustee to take.

The powers of the corporation are limited, and a trust beyond those powers cannot be executed. 4 Wheat. 636; 9 Watts, 551; 6 Conn. 304; 1 Ves., Sr., 534.

If the city of Philadelphia is the trustee, the estate is in one body and the execution of the trust in another, for all the people are a part of the corporation. The head of the corporation cannot be separated from the body.

In ordinary cases, where there is no trustee, the court may appoint one; but this cannot be done here, because the trustee, being a corporation, has perpetuity, and a similar one must be selected. 4 Wheat. 28; 1 Ves., Sr., 534; Duke, 245.

A part of this devise would make it a curse to any civilized land; it is a cruel experiment upon poor orphan boys to shut them up and make them the victims of a philosophical speculation. By the laws of

Pennsylvania it is blasphemy to attack the Christian religion, but in this case nothing is to be taught but the doctrines of a pure morality, and all the advantages of early impressions upon the youthful mind are entirely abrogated.

Binney, for the defendants.

(Argued that under the true construction of the will, the heirs of Girard could not take even if the devise for the college should be set aside; because the city of Philadelphia would come in as residuary legatee; the income of the fund being applied, in such case, to "diminishing the burden of taxation," and other public objects specifically pointed out. This part of the argument is omitted, because the decision of the court is placed upon other grounds. Mr. Binney then proceeded to comment on the objections to the devise, which had been made by the counsel on the other side.)

The objection made by the counsel on the other side is twofold: first, that the city is incapable of taking a legal estate by devise; and second, that the trust is void, because the beneficiaries are too uncertain. The first point was not pressed, and is considered as abandoned. As to the second, this charity is as precise as any which has ever been established. The trust is to build upon a place specially marked out; the children are to be poor, born in Philadelphia, then New York, then New Orleans. The description is specific and limited. In England, a charity, however general, always succeeds; there is no case in which it has failed. The only question there is about its administration; whether by the chancellor in his ordinary jurisdiction, or under the sign manual of the crown. The statute 32, 34 Henry VIII., which forbade devises to corporations in mortmain, never was in force in Pennsylvania. The settlers agreed in England upon the laws which should govern them.

White & Brockden's History of Laws, Appendix 1, says that wills, &c., in writing and attested should have the same force as to land that conveyances had. This was on 5th May, 1682. The same rule was established on the 7th December, 1682, if the will were proved in forty days. Same book, Appendix 4, chapter 45.

On the 1st January, 1693, this law was in force. The legislature requested the governor to declare what laws were in force, who complied and declared that this was, amongst others. Same book, Appendix 7, 8.

In 1683, a law restrained the testator, if he had a wife and child, from

willing away more than one-third; but in 1693 the full power was restored. Same book, Appendix 9.

After a slight alteration (see Appendix 12), the statute of wills was passed in 1705, which was in force until Girard's death. It declares that wills in writing, and attested, shall be good as conveyances. The power to make a will is general, and to devise to any one. If corporations, therefore, can take by deed, they can by devise.

The corporation has power to take. If the statutes of mortmain are in force, they do not intercept the grant on its way to the corporation; there must be an office found to escheat the property to the state. 7 Serg. & R. 313; 14 Pet. 122.; Shelford, 8.

The policy of the mortmain statutes of England has not been adopted in Pennsylvania. The act of 1791 (Purdon, 182, 183) forbids corporations from holding property "exceeding £500 in income," but permits them to hold any quantity of unproductive land.

The statutes of mortmain do not extend to Pennsylvania. If they do, it is contrary to the English decisions about their colonies. 2 Meriv. 143; 2 Mad. Ch. Pr. 61, note 62; 8 Wheat. 476.

If they had been considered as being in force, there would have been escheats under them; but none are found.

The rule prescribed by the court in 3 Binn. 597, was that where there was a Pennsylvania statute on the same subject with an English statute, the latter was not in force. But this could not be carried out universally, for the statute 4 Anne and the Pennsylvania law of 1714 were declared both to be in operation.

The city of Philadelphia has an unlimited power to acquire land. The charters of 1701 and 1789 both give it. 2 Smith's Laws, 462. The power is to hold to them and their successors forever, or they can alienate it as a natural person can.

Has the city power to take in trust? The old doctrine was that a corporation could not be seized to a use. Sugden on Uses, 10. But it has been since settled that a corporation may be a trustee. If it receives a deed, the legal estate will pass, provided the statutes of mortmain do not prohibit it. If the trust is void, equity will decree a reconveyance; but this cannot be necessary, unless the legal estate had passed. And if a corporation is incapable of executing the trust, equity will appoint some person who is not. 1 Saunders on Uses, 346, 349; Willes on Trustees, 31; Levin on Trusts, 10, 11; 2 Thomas's Co. Litt.

706, note; 1 Cruise's Dig. 403, tit. 12, Trust, chap. 1, sect. 89. Also that a corporation may be a trustee. 2 Vern. 411; 2 Bro. P. C. 370; 7 Id. 235. Where a corporation abused a trust and was dismissed, see 3 Bro. Ch. Cas. 171, 371; 4 Ves. 453; 2 Id. 46; 1 Id. 467; 14 Id. 253; 12 Mass. 547; 17 Serg. & R. 89; 3 Rawle, 170. The cases in 12 Mass. 547, and 17 Serg. & R. 89, may not appear at first to sustain the doctrine, but the cases are right. That of 3 Rawle, 170, is very much like the present, and establishes the doctrine, that if the trust is for the welfare of the corporation, it may take it.

The acts of the legislature of Pennsylvania of 24th March and 4th April, 1832, are strong indications of what the law is in that State. That of March (sects. 10, 11) gives the corporation power to carry out the trust; enacts that no road shall pass through the land, and gives power to appoint officers. Both acts acknowledge and assist the trust, and imply that the corporation had power to take it. This is evidence of an existing power. 4 Pet. 503.

The charter of Philadelphia (page 73 of city ordinances), in the 16th section, grants a general power to make laws for the welfare of the people.

The case in 1 Ves. 534, does not warrant the inference drawn from it by the counsel on the opposite side. See as to this case Boyle on Charitable Uses, 84.

As to the uncertainty of the beneficiaries:—

It is an error to suppose that a trustee must take for beneficiaries known and established. Suppose a marriage settlement for life with power to devise. Where is the estate beyond the life until the power is executed? It vests in no one. A charitable use is only a power of appointment, and the children, in this case, when named, have a good right to the use. So it is in churches. When a minister is elected, he takes the estate according to the foundation; and so also with school-masters, who have sometimes a freehold. Shelford, 762, 763, 765, 767, 730.

If the trustee will not nominate, chancery will. 3 P. Wms. 146; 3 Atk. 164.

The tenure of the *cestui que use* is fixed; the boys of merit are to remain in the college until they are from fourteen to eighteen years of age. They are easily ascertainable. It is true that no one has a claim until the appointment is made. But this is the case with many trusts

of private property where the estate is uncertain until certain issue are born. Where there is a power to name some one of kin to take, a remote relation may be selected: 1 Atkyns, 469; 4 Russ. 292. A power to appoint amongst "poor relations" may be either a charity in the legal sense of the term, or an ordinary provision of kindness. 7 Ves. 436; 2 Atk. 328; 17 Ves. 371; 1 Sh. & L. 111; Boyle on Charities, 31-34. The only difference between the two is that in the first case, it will last longer than in the other. A power of appointment is sometimes vested in particular persons from special confidence, and sometimes it passes to heirs. Charities are kept up forever.

Uncertainty is indispensable to all charities. If any one has a right to claim by law, it ceases to be a charity.

Where did the favor with which charities are regarded, and the motive by which they are established, spring from? The doctrine is traced up to the civil law. But where did Justinian get these ideas? They came from Constantine, the first Christian emperor, and they can be traced up to a higher source than that—the Bible. The Anglo-Saxons received all their principles from the same authority. Orphan-houses were exempted from taxation. Originally the injunction of the Bible was to "honor thy father and thy mother;" but the domestic affections are selfish, and it was reserved for Christianity to enjoin the duty of "loving thy neighbor as thyself." The Jewish lawyer asked who his neighbor was, and it was hard to convince him that a Samaritan could be so. There was the same difficulty as now respecting the uncertainty of the beneficiary. The lesson of charity is taught too in the case of the woman who, in her humility, claimed only the crumbs that fell from the table, and in the beautiful parable of visiting the sick and the prisoner: "Inasmuch as ye have done it to the least of these, ye have done it unto me." Even in the old Jewish records, we find the same lesson of philanthropy taught where the sheaf is left for the unknown and unacknowledged stranger. It is the uncertainty of the person upon whom the benefit may fall that gives merit to the action. A legacy to a friend is no charity. The first trustee for a charity was St. Paul. The sick are always uncertain; and to all hospitals, the objection now made would apply, 2 Domat, 169, title 2, sect. 3; 2 Ves. 273; 1 Vern. 248; 7 Ves. 65; 17 Id. 371, that it becomes a charity as soon as uncertainty begins. Ambler, 422; 5 Rawle, 151; manuscript case from Pennsylvania, not yet reported, that beneficial societies are not charities.

[*Mr. Binney* then proceeded with his own argument, and stated the following points:]

1. That such uses as those in Mr. Girard's will are good at the common law in England, which is the common law of Pennsylvania.
2. That the city being in possession of the trust, nothing more is necessary for them, as they want no remedy whether there would be one at common law or not.
3. That such trusts are entitled to protection in equity, upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.
4. That they in fact enjoyed this protection in chancery before the 43 Eliz. by the original jurisdiction of that court, and have had it ever since.
5. That 43 Eliz. is only an ancillary remedy, long disused in England from its inconvenience, and is supplied by chancery, not as an usurper on the statute, but as the rightful original tribunal for such trusts.
6. That whatever the 43 Eliz. imparted to the law of Charities, except the mere remedy by commission from the Lord Chancellor, is thoroughly adopted in Pennsylvania, together with the great body of the equity code of that kingdom.
7. That the law in Pennsylvania is the same as the law in all the other States except Virginia and Maryland.

1. Such uses were good at common law.

They can be traced up to an early period, anterior to Richard II., and the principle upon which they are founded even up to the time of the Conquest. 4 Reeves, 80; Moo. 122. The principle of these charities is also engrafted upon the old English tenures, Co. Litt. 94 b; Littleton, sects. 132, 136, where provision was made that the soul of the donor should be prayed for. Co. Litt. 96 a.

The tenure was called "frankalmoign." There was another instance where 100 pence were to be distributed to 100 poor men on a certain day. Co. Litt. 96 b; 2 Inst. 456, 406. There were perpetual charities in trust. 6 Co. Rep. 2; Co. Litt. 149 a; Brooke's Abr. part 2, Tenure, 53. Some of the early statutes recognized them.

The Stat. 17 Edward II., chap. 12, passed in 1334, related to the Knight Templars; at the dissolution of the order, the lands were assigned to the Knights of St. John for the same godly uses to which they had been applied, viz.: relieving the poor, &c.

There arose a contest between religious houses and the king about mortmain, and afterwards about superstitious uses. Monastic houses were the conservators of public records and the sources of instruction.

15 Richard II., chap. 5, was the last of the statutes of mortmain: Chap. 6 allowed spiritual corporations to hold the property of the church and the glebe, subject to making donations for the poor.

Henry IV., chap. 2, allowed the vicar to be endowed, &c.

2 Henry V., chap. 5, recited that abuses existed in charities and ordered a commission of inquiry to reform them.

23 Henry VIII., chap. 7 (see 4 Pickering, 239), called the statute of mortmain, aimed a blow at these charities. It was passed in 1531, and the king was married to Anna Boleyn in 1532.

27 Henry VIII., chap. 25, was the first poor law of England.

1 Edward VI., chap. 14 (5 Pickering, 267), endeavored to preserve some of the charities from destruction. Boyle, 263, note, refers to this statute, which required commissioners to execute charities for the benefit of the poor. See also stat. 2 Edward VI. (5 Pickering, 299); stat. 1 and 2 Philip and Mary, chap. 8 (6 Pickering, 234). The monasteries were by this time put down and the charities destroyed.

Then came the statute 39 Elizabeth, chap. 5, from which the Pennsylvania Act of 1791 is taken; this statute was continued in force until repealed by 9 George II. From the circumstance that the charities were put down by the destruction of the monasteries arose the necessity of the 39 and 43 of Elizabeth, which intended to lessen the evil of pauperism by hunting up charities, but which established no new principle in the laws of England. 4 Inst. 66.

2 Gibson's Codex, 1155, where the statute of 39 Elizabeth is found. This last law is a general one, and covers a larger extent of ground than the 43 Elizabeth, chap. 4. Chapters 2 and 3 show the character of chap. 4. Chap. 2 is a poor-law, and so is chap. 3, for mariners. The 43 Elizabeth enumerates twenty-one charities, but the 39th comprehends all lawful ones. Hospitals were included in the latter but not in the former. The stat. 7 Jac. 1, chap. 3, has for its object to bind out poor boys. In Girard's case the boys must not only be poor, but orphans, a double merit.

There is a dictum of Lord Roslyn in 3 Ves. 726, in relation to a will being an appointment at common law; but the point decided in that case has nothing to do with the present.

But there is not a single case where the validity of a charitable use has been directly questioned at law; wherever the question came up, it was always incidentally.

The Year-Book of 38 Edward III. forms the basis of Co. Litt. § 383. There was a condition subsequent, which, if violated, gave the heir a right to enter. What was then called a condition is now called a trust, Sugden on Powers, 121; Perk. 563; And. 43, 108; 3 Dyer, 255 d, same in Jenk. 6.

The last case mentioned occurred in 8 and 9 Elizabeth, and is the Trinity College case. The question was, whether a devise to the college, which was not a spiritual corporation, was good, and it was ruled to be so.

The Skinner's case occurred in 24 and 25 Elizabeth, (Moo. 129,) where the use was to pray for the soul of the donor. So much of the use as was esteemed superstitious was set aside, and the rest confirmed. See also Moo. 594, (or same case in Poph. 6,) where the heir of the executor who had a trust estate recovered from the heir of the donor.

In Porter's case, 1 Co. 22 (92), the question was not raised whether a charitable use was good at common law.

We see from these cases what the condition of England was about the time of 34 Elizabeth. The statute 23 Henry VIII. did not go into effect for twenty years. Duke, 360; 4 Co. 116; 8 Id. 130.

All these cases sustained charities for the poor and were anterior to 39 Elizabeth.

This Court has affirmed the validity of charities at common law. A dedication to pious uses is sustainable only upon that ground. 6 Pet. 498, 431; 12 Wheat. 582; 10 Pet. 712; 2 Id. 256; 9 Cranch, 212; 4 Pet. 487; 4 Serg. & R. 212.

The common law of England is in force in Pennsylvania. In the case of the Bush Hill estate it was ruled that the burden of proof is on him who affirms that any particular part of the common law is not so in force. 9 Serg. & R. 307.

2. The city is in possession, and wants no remedy. If the use is good, the owner of the legal estate cannot recover. 2 Dowl. & Ry. 523; 5 Madd. 529, (429.)

But it is said that the use is not good because the proposed college is unchristian. The bill filed in the cause makes no such objection. If zeal for the promotion of religion were the motive of the complainants,

it would have been better to have joined with us in asking the State to cut off the obnoxious clause than to use the plea in stealing away the bread of orphans. We are not here to defend Mr. Girard's religious belief, whatever it was. During his life he exhibited his philanthropy at a perilous moment. When the yellow fever burst upon Philadelphia in 1794, almost every one fled, regardless of his property. Girard walked the wards of hospitals, not subdued by the groans of the dying or deterred by the fear of death to himself. All that he had was freely given to alleviate the wretched sufferers. More charitable even than the good Samaritan, he had not only poured oil upon their wounds, but stood by them to the last. The difficulties that surrounded his plan of a college were great. His desire was to include the orphan poor of all sects, Jews as well as Christians, and those who had no religion at all. He might have placed it under the protection of some one religious denomination, but then it would have become a religious establishment, and met with opposition from other quarters. If all sects were to be admitted, what could he do other than what he did? If any clergyman was to be admitted, he would, of course, teach the doctrines of his own church. No two sects would agree. Some would adopt one part of the Bible, some another. If they agreed as to what was to be left out as apocryphal, they would differ about the translation of the rest. The Protestant would not receive the Douay Bible. See the difficulties that exist in New York about the introduction of the Bible as a school-book. Girard did what was in conformity with law, and often done practically. He had to abandon his scheme or prevent discord by adopting the plan which he followed. The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith—the Bible. It is therefore affirmatively recommended, and in such a way as to preserve the sacred rights of conscience. No one can say that Girard was a deist. He has not said a word against Christianity. In the Blucher School in Liverpool there are no preachers. There is no chaplain in the University of Virginia. By excluding preachers, Girard did not mean to reflect upon Christianity. It is true they cannot hold office. But the Constitution of New York excludes clergymen from offices, civil or military. If the situation of a school-master is an office, then a clergyman cannot be a public teacher. Girard only says that laymen must be instructors, and why cannot they teach

religion as well as science? Sunday-schools are not prohibited. It is said by the opposite counsel that these poor victims are cast into a prison and shut up for the sake of an experiment. But there is no prohibition against their going out to church—to as many churches as their friends choose to take them to. All that is done by the will is to secure the college from controversy. It is optional with the friends of the orphans whether to permit them to go there or not. Cannot the trustees erect a hospital without the walls where the sick can be sent and have the services of a clergyman when necessary? But religion can be taught in the college itself. What, for example, is there to prevent "Paley's Evidences" from being used as a school-book?

The law of Pennsylvania is not infringed.

In the case of Updegraff (11 Serg. & R. 400), the court said that Christianity was part of the law. But it was Christianity with liberty of conscience to all men. This is exactly what Girard thought.

By the 3 sect. of the 3 art. of the Constitution of Pennsylvania, "all men have a right to worship according to their conscience." If worship were prohibited in the college (which it is not), it would not be against law. The Constitution says that no man is disqualified who acknowledges the existence of God and believes in a future state of rewards and punishments. Christianity is part of the law, so that blasphemy can be punished, but not for the purpose of invading the conscience of other persons. But, at all events the college is not yet built nor the regulation enforced. It is too soon now to set it aside. The city is in possession of the property, and so it must remain. The administration of the charity is a matter for the courts of Pennsylvania exclusively.

3. That such trusts are entitled to protection in equity upon the general principles of equity jurisdiction, which protects all lawful trusts whether there be a trustee or not.

In England the power of the king as *parens patræ* is delegated to the Court of Chancery. Where there are no trustees or objects of the charity, it is then administered according to the pleasure of the king. See this investigated in Story's Equity, 404. The ancient rule, says Coke, is good; the authority of chancery is plentiful, and the court will not let a trust fail for want of a trustee. Co. Litt. 290, note 1; Co. Litt. 113; Wilmot's Notes, 21-24; 2 Eq. Cas. Abr. 198; 1 Ves. 475; 2 Story on Equity, 320.

The court did not derive this power from the statute, but from its jurisdiction over trusts. 2 Story, 430; 2 Milne & K. 581.

Equity is a part of the law of Pennsylvania, and this is a branch of equity powers. The Supreme Court has the powers of a court of chancery. 1 Dall. 211, 213, 214; 1 Binn. 217.

In Pennsylvania, specific performance is obtained at law by cautionary verdicts. 3 Serg. & R. 484; And. 392.

4. Such trusts in fact enjoyed protection in chancery before the 43 Elizabeth, by the original jurisdiction of that court, and have had it ever since. Duke, 135, 154, 242, 380, 519, 644; 2 Gibson's Codex, 1158, note 7; 1 Ch. Cas. 157; 2 Lev. 167; 2 P. Wms. 119; 2 Vern. 342; 3 Atk. 165; 2 Ves. 327, 425; Wilmot's Notes, 24; 1 Blythe, 312, 334, 342, 346, 347, 357, 358, 67, 61.

There is a dictum of Lord Rosslyn that it did not appear that Chancery had such jurisdiction before the statute of Elizabeth; but he has been misreported, or if he said so, he is not sustained by the old authorities, Tothill, 58; Choice Cases in Chancery, 155, in 34th of Elizabeth; Duke, 163.

There was a decree made in 24 of Elizabeth, before the statute and upon the judicial power of Chancery. It related to a deed of bargain and sale, which was not enrolled and did not pass the land. Duke, 131, 138, 359-361; 1 Milne & K. 376.

The book lately published in England by the Record Commissioners, furnishes numerous instances of the exercise of this chancery jurisdiction anterior to the statute of Elizabeth.*

* SCHEDULE OF CASES FROM CHANCERY PROCEEDINGS IN TIME OF
ELIZABETH.

[Proceedings in Chancery, Vol. I.]

Record Commission.

Babington v. Gull, clerk. Bill complaining that plaintiff's mother had placed 600 marks in the hands of defendant, for the purpose of founding a chantry in the church of St. Peter of Haworth, in Nottinghamshire, which he had neglected to do.

Answer of William Gull, that he had received the money mentioned in the bill, for the purpose therein; but adding that if the endowment of the chantry were not completed within four years, which are not expired, the money was to be applied in finding three priests to sing daily in the said church; and that he is willing to pay the said money according to the direction of the court.

The prayer is, the plaintiff being without remedy of common law, to issue subpoenas, and to call defendant before him to be examined, and to do and receive

If this part of the common law be not in force in Pennsylvania, the complainants must prove it. If they think so, why do they not resort to the civil courts? It can be shown, however, that Pennsylvania has actually adopted the laws that govern charitable uses.

according as faith, reason, and good conscience require; and this for the love of God, and in way of charity.

Wakering v. Bayle. (Henry VI.) Bill to compel defendant, who is feoffee in trust to make an estate in certain lands in Tottenham and Hornsey, to the hospital of St. Bartholomew, in West Smithfield, for the endowment of a chapel there; "because great multitudes of Christian people of all parts of England and other nations for sickness, poverty, and misery, continually of custom resort to the said hospital, and there relieved; and finally have their Christian sepulture round about the said chapel."

Praying a subpoena, and as in the preceding case, as shall be thought unto your good lordship best, right of conscience to be had and done at the reverence of God, and in way of charity.

Pledges of prosecution. { ROB. PALMER, } Of London,
WELLS BALLE, } gentlemen.

Parker et al. in behalf of themselves et al., the inhabitants of the town of Brentwood, Essex, v. Wistan Browne. (Eliz. B. 6, 12, 13.) Bill to establish donations. A chapel of ease to the parish church of Southwilde, in which parish the town of Brentwood is situated, and a free school and alms-house there, the said chapel being within the manor of Corbedhall, granted to Sir Anthony Browne, knight, deceased, by letters-patent from Edw. VI.

Town of Bury St. Edmunds, by Robert Goldeny et al., Governors of Free Grammar School of King Edward VI., in Bury St. Edmunds, v. Goodney et al. (Eliz.) Bill to quiet possession of lands held by complainants in right of grammar school.

Buggs et al., feoffees in trust for the parish of Harlon, v. Sompner et al. (Eliz. B. 6, 17, 18.) Bill to establish charitable uses, in a tenement called the Old Pole, and lands thereto belonging, in Harlon, conveyed and settled tempore Henry VIII. by John Swerder, to feoffees in trust for poor of the said parish of Harlon.

Bullatt and Purcas, church-wardens, v. Fitche. (Eliz. B. 6, 18.) Bill for performance of charitable institutions. Land called Church Pightle, held from time immemorial for repairing the parish church of Lyndsell.

Blenkinsopper v. Awnderson. (Eliz. B. 6, 19.) Bill to establish a charitable donation. An annuity of £8 for certain paupers and a schoolmaster, in the parish of Burgh under Stainsmore, devised by Sir Cuthbert Buckle, knight, late Lord Mayor of London, to be charged on his messuage called the Spittle or Stainsmore, and lands thereto belonging.

Fytch and Goodwin, church-wardens, and Wyndell et al., overseers of the parish of Bocking, v. Robinson et al. (Eliz. B. 6, 29.) Bill to recover a legacy to charitable uses. The sum of £400 bequeathed by Joan Smyth, widow, to be invested for producing a yearly fund for the relief of the poor of Bocking.

Thomas Tychmer et al., church-wardens of the parish church of Barrington, and Shevyn Reynolds, the elder, and several others, co-feoffors of lands in trust, v. Lancaster. (Eliz. B.

To begin with the charter. "The laws for governing property are the same as those of England." 5 Smith, app. 407, sects. 5, 6; Amended Charter, 1701, app. 413; Act of 1718, 1 Smith, 105; Act of 1777, Id. 429, sect. 2; 1 Dallas, 67, where it is said as the opinion

6, 31.) Bill for injunction in support of a charity. A tenement and lands in Barrington, lately held of the master and fellows of Michael House in Cambridge, as of their manor of Barrington, devised by the will of Thomas Lames to charitable uses for the poor of Barrington.

George Carlton on behalf of himself et al., inhabitants of Elm, v. John Blyth et al. (Eliz. C. c. 6.) Bill to recover charitable donations. A legacy of £13 13s. 4d. bequeathed by the will of John Allen, deceased, to be invested at interest for the benefit of the poor of the parish of Elm.

Robert Perot and others, inhabitants and parishioners of the parish of Cornworthy v. Steven Cruse. (Eliz. C. c. 6.) Bill to appoint new trustees for a charity. A tenement called the church-house in the parish of Cornworthy, conveyed by Sir Pearce Edgecombe, knight, or some of his ancestors, to feoffees in trust for the benefit of the parish of Cornworthy.

John Irish and others, tenants of the manor of Congresbury, v. Thomas Ashe and others. (Eliz. C. c. 22.) Bill for performance of will for charitable uses. The manor or lordship of Congresbury, and lands in Congresbury and Lawrence Wille, devised by the will of John Carr to the defendants upon sundry trusts.

The Mayor and Citizens of Chester v. Brooke and Offley. (Eliz. C. c. 23.) Bill to establish a charity.—Legacies left by the will of Robert Offley of London, haberdasher, for the benefit of apprentices and other inhabitants of the city of Chester.

The Vicar and Church-wardens of the parish of Christ Church within Newgate, v. The Vicar and Church-wardens of the parish of All Saints, Barking. (Eliz. C. c. 24.) Claim of donation to charitable uses. A legacy of £4 per annum bequeathed by the will of Jane Watson, and claimed by both these parishes.

The Mayor, Bailiffs, and Burgesses of Dartmouth v. Nicholas Ball. (Eliz. D. d. 2.) Bill for appointing new trustees for charitable uses. Lands in Clifton Dartmouth Hardness, and in Stokeflemyer, &c., conveyed by Nicholas James to feoffees in trust for the benefit of the poor of said borough, and for repairing the church and harbor.

The Church-wardens, Parishioners, and Inhabitants of the town and parish of Danbury v. Thomas Emery and others. (Eliz. D. d. 7.) Bill to regulate charitable donations of land—lands in Burleigh purchased by certain well-disposed persons in trust for the poor of Danbury.

The Mayor, Bailiffs, and Burgesses of Clifton Dartmouth Hardness v. Furseman et al. (Eliz. D. d. 11) Bill for performance of charitable trusts—lands in Clifton Dartmouth Hardness, conveyed by William James to feoffees in trust for the poor of Dartmouth and other charitable purposes.

Blacknall et al. on behalf of the Inhabitants of Elksley v. Spiry et al. (Eliz. E. e. 4.) To establish a charitable donation. A parcel of ground in the parish of Elkesley, called Normanton Field, containing 500 acres, which was of ancient time given and conveyed to certain feoffees in trust for the said parish.

George Carleton, Esq., for himself and the rest of the Inhabitants of the parish of Elm, v.

of the court, "that the common law has always been in force." 1 Dallas, 73, 211; 3 Serg. & R. 578, (378;) 1 Binney, 519, (579;) 4 Id. 77.

The Act of 1730 authorizes persons to hold land for charitable uses. This is said to be an enabling Act: but it is upon a different principle

John Blythe et al. (Eliz. E. e. 5.) For charitable purposes a legacy or sum of £13, 13s. 4d. bequeathed by the will of John Allen, deceased, for the use of the parish of Elm.

Walter Jenkins et al., tenants and inhabitants of the manor and parish of Fairford, v. Oldesworth. (Eliz. F. f. 3.) To establish right of copyholders and charitable donation. The manor of Fairford, late the estate of Roger Lygor, Esq., and Katherine his wife.

The Mayor, Jurats, and Commonalty of the town of Feversham, v. Lauy Hannots et al. (Eliz. F. f. 7.) To establish a devise to a corporation. A messuage, garden and lands in Feversham and all other his lands, &c., in the Isle of Hartye, &c., all which after the decease of his said wife, he devised to the said mayor, jurats, and commonalty in fee—for the benefit of the said corporation repairing the harbor and highways thereof.

Richard Estmond et al., inhabitants of the town of Gillingham, v. E. Lawrence. (Eliz. G. g. 12.) Bill of revivor to establish certain charitable uses. Divers messuages, lands, and tenements, parcel of the copyholds of the Queen's manor of Gillingham, which the bill states to have been held time immemorial for the support of a charity-school, and other charitable purposes in Gillingham.

Goodson et al. v. Monday et al. (Eliz. G. g. 12.) For performance of a trust for charitable uses. Divers messuages and lands in Ailesbury, &c., some time the estate of John Bedford, who by a feoffment dated 10th July, 1494, conveyed the same to certain feoffees in trust, among other things for the repair of the highways about Ailesbury and Hartwell.

Sir Arthur Havenyngham and other inhabitants of Havenyngham v. Th. Tye et al. (Eliz. H. h. 1.) To obtain attornment and rent for charitable purposes. Fifty acres of land, meadow and pasture, called the town land of Havenyngham, lying in Badyngham, in the occupation of defendant Tye, the reversion being in feoffees for the use of said town.

Thomas Sayer et al., overseers of the poor of Hallingbury Morley, v. Lambe et al. (Eliz. H. h. 2.) To establish a charitable donation. A sum of £20 given by the will of Thomas Lambe, deceased, to be for the perpetual benefit of the poor of Hallingbury parish, and which the bill prays may be laid out in the purchase of land for that purpose.

[Proceedings in Chancery, Vol. II.]

Lyon and wife v. Heve and Kemp. (Temp. Edw. IV.) This is a bill, answer, and replication. The complaint being that the defendants had disposed of property, left for religious and charitable purposes contrary to the will of the plaintiff, Ellen's late husband.

Huckmore v. Lang—to recover title deeds for charitable uses.

Buggs et al., inhabitants of parish of Harton, v. Sebley. For establishing charitable donations. A copyhold tenement which was surrendered by one John Godralf to the use of the poor of the said parish.

from the English statutes which are intended to aid, in some measure, a religion not fully tolerated by law. But in Pennsylvania there is universal toleration, and all sects stand upon equal ground. In England, the mass is held to be superstitious. Boyle, 242.

Sayer and Pryor, overseers of poor of parish of Morley, v. Lambe et al. To recover charitable donation. £20 bequeathed by the will of Thomas Lambe to the inhabitants of the town of Hallingbury Morley—the income thereof to be for ever applied to the use of the poor of the said town.

Heron and Browne, Ex'rs of Freston, v. Sprotton et al. (Eliz.) For performance of a will respecting charitable donations. Divers messuages, lands, and tenements in Altofts, &c., &c., late the estate of John Freston—who by his will gave large sums of money for building and endowing an almshouse in Kirkethorpe, and a free-school in Normanton, repairing highways and other purposes.

Fisher for himself and other the inhabitants of the town of Irchester v. Bletsoo. In support of a charitable donation. Divers messuages, lands, &c., in Irchester, &c., which in time of King Henry VII. were given and granted by Will. Taylor and John Lely to trustees for the use of the poor of Irchester, and repair of the bridges there.

Stock et al. on behalf of the poor of Icklingham, v. Page et al. For performance of a charity. A capital messuage called the Town-house with fourscore acres of land and a sheepwalk in Icklingham, settled from ancient time in feoffees for the use of the poor of said town.

W. Fisher, master of the Hospital of St. Mary of Ilford, v. Anne Seward, widow. (Eliz.) Bill of revivor to recover dues of a charity. Titles of demesne lands of the farm of Eastbury and the tithes of, &c., settled for the relief of poor persons in the hospital of Ilford.

Th. Foxe, for himself and other the inhabitants of the parish of Kybworth, v. Benbe et al. (Eliz.) For the support of a charity. Nine messuages and six cottages and six yards land in the towns, fields, and parish of Kybworth, &c., given for the support of a schoolmaster and grammar-school at Kybworth.

Z. Babington, master or warden of St. John Baptist in the city of Litchfield v. Sale et al. (Eliz.) For the support of a charity. A capital messuage and divers other houses and 100 acres of land in Litchfield, &c., held for the support of poor persons in the said hospital, and also of a free grammar-school.

The Mayor and Burgesses of King's Lynn v. Howes, clerk. (Eliz.) For performance of a charitable donation. John Titley, Esq., by his will gave a payment, charged upon his dwelling-house at Lynn, for the maintenance of a preacher there, and other charitable purposes.

R. Newton, clerk, and the Church-warden and inhabitants of the parish of Little Monden v. Dane. (Eliz.) To establish a charitable donation. A messuage, &c., devised by the will of Rafe Fordam to defendant, for certain charitable purposes stated in the bill.

Rycardes, Moore, and King, for themselves and the rest of the Inhabitants of Rodborough v. Payne et al. (Eliz.) To protect a charitable donation. Certain lands, &c., in Rodborough, &c., which in the time of King Henry VI. were given by Margery Breyseyne and others to the church-wardens and inhabitants of Rodborough, for the

The statute 23 Henry VIII., a mortmain Act, avoided deeds "for superstitious uses." But what were deemed to be so in England, are not held to be so in Pennsylvania. So a statute of Henry VIII. prohibited gifts to Catholics.

performance of divine service in chapel of ease to said parish, but which defendants claim as having been forfeited to the crown, being given for superstitious uses.

[Proceedings in Chancery, Vol. III.]

Spenser et al., trustees, v. Grant and wife Joan. (Eliz.) Claim to a rent charge given in trust to plaintiff for charitable purposes. Agnes Chepsey of Nottingham, demised unto Coles and Joan his wife, divers messuages, &c., at a certain rent, which she afterwards demised to the plaintiffs in trust to pay into the hands of the chamberlain of Northampton, for and towards two-fifteenths of the said town; which rent, after the decease of the said Agnes, the defendant Joan and her then husband, the other defendant, refused to pay to plaintiffs.

Smith, and Willis, church-wardens of St. Aldatis, Oxford, on behalf of the parish, v. Smith, Ald. and Furney's feoffees. Against defendants as feoffees in trust to perform and carry into effect such trusts to charitable uses. Edgecombe being seized of certain houses, &c., in city of Oxford, conveyed the same to certain feoffees in trust; who, from the profits thereof, were to repair the church, to relieve the poor, and for other good and charitable purposes. They conveyed the same to new feoffees, of whom the defendants are survivors, and refuse to account.

The Inhabitants of Thirplangton v. Jarvis, only surviving feoffee. To compel performance of trusts in a deed of feoffment for charitable uses, and to convey to other trustees, a house on Thirplangton and tenements in East Langton, &c.

Turney and Roberts v. Buckmasters. To protect the plaintiffs in the execution of the will of Thomas Knighton for charitable uses. Lands lying within manor of Leighton Bussard. The defendants allege the same to have been left to superstitious uses, and endeavored to get the same into their own hands.

The Master and Brethren of the Hospital of Robert, Earl of Leicester, in Warwick, v. Lee et al. (1600.) For payment of an annuity of £20 given to a charity. Robert, late Earl of Leicester, being seized in fee of an annuity of £20, issuing out of a farm called, &c., the inheritance of a defendant Ogden, by deed gave the same to the said hospital.

Henry Hall and John Hall, on behalf of themselves and others, the freeholders and inhabitants of Witham, Essex, v. Panke. (39 Eliz.) For the support and continuance of a charity. By the gift and grant of well disposed persons, divers lands and tenements in Witham, and also divers sums of money, were given for the reparation of the church, the relief of the poor, and other charitable purposes; which lands were settled in feoffees; and the defendant having got possession thereof, and moneys, and the deeds of settlement, refuses to perform said trusts, or to appoint new feoffees in the names of those dead.

John Lloyd, D.D., vicar, Thomas Baker, and Richard Wilborn, church-wardens, and poor of Writtle, v. John Aware et al., surviving feoffees in trust for said parish. (1596, 38 Eliz.) For the continuance of a charity. A messuage and land called Hooke's in the

In 1548, 2 and 3 Edward VI., chap. 1, the Act of uniformity establishing the church, directed all ministers to observe the mode therein pointed out. The Book of Common Prayer was thus legalized.

1 Mary, session 2, chap. 2, repealed the above.

1 Elizabeth, chap. 2, re-established the Act of Edward, and extended to the people the mandate to use the Book of Common Prayer.

This was again repealed in the time of the Commonwealth.

The 13 and 14 Charles II., chap. 14, was another uniformity Act; and this was the state of the laws relating to religion when the charter of Pennsylvania was granted in March, 1681.

Gifts to Catholic congregations were void. Moore, 784, cited in Boyle, 265; 1 Salk. 162; 1 Eq. Ca. Abr. 96.

When the statutes of conformity were in force all gifts contrary to them were void; and this is the origin of the doctrine of *cy-pres*. 2 Vern. 266.

In 1688, 1 W. and M. chap. 18, toleration was extended to all who

parish of Writtle, which in the year 1500 was given by Thomas Hawkins to feoffees in trust for the poor of the said parish.

R. Wyllot and Thomas Sudbury, church-wardens and inhabitants of the town of Middleton, v. Agnes Middleton, widow. (13 Eliz.) To recover a charitable pension. A yearly rent of 6s. 8d. payable to the parish of Middleton, charged upon a messuage and land in Middleton.

John Whitehurst and Thomas Amery, for themselves and other inhabitants and parishioners of the parish of Dulerne in the county of Stafford v. George Warner. (1573, 15 Eliz.) For support of a charity. Robert Warner, deceased, and others, inhabitants of the said parish, having a sum of money to invest for the erecting of a grammar-school and providing a schoolmaster, purchased therewith certain lands in Kenwalmerche, &c., in Devonshire, and applied the rents and profits according to the trust; which lands afterwards became vested in defendant as surviving feoffee, who had received other money to purchase a messuage and land in Fradley in the county of Stafford, which he neglected to do.

George Warner v. Whitehurst et al. (20 Eliz.) Cross bill setting forth the bill. A decree and an award had been made by the several contending parties; and for carrying the said award into execution, and to protect the plaintiff against his arbitration bond signed by him, this proceeding is instituted.

Fisher et al., inhabitants of Warwick, v. Robert Philipps and Thomas Cawdrey. (1574, 15 Eliz.) For the recovery of sundry bequests of money left by will of Thomas Okery, deceased, to be applied to charitable uses in the town of Warwick.

John Rawley et al., inhabitants of the parish of Wilborough, v. Lewis et al. To appoint new trustees of a charity. Lands and tenements in parish of Wilborough, containing 120 acres, of which the defendants were surviving feoffees in trust for repairing the parish church.

would sign the thirty-nine articles with some exceptions. This Act is all that now supports a use in favor of dissenters. 2 Ves. 273, 275; 2 Eq. Ca. Abr. 193; 3 P. W. 144, 344; 1 Ves. 225; 3 Meriv. 409. See also 11 W. and Mary, chap. 4, sec. 3, in which the Toleration Act is extended to the colonies.

There is not a word in the charter respecting toleration of any religion. Sect. 22 protects the church of England by saying that preachers sent by the Bishop of London may reside in the province.

The stat. 5 Anne, chap. 5, sect. 8, in 1706 secured the rights of the Church of England, as established in that country and the territories thereunto belonging. From the commencement of the reign of Anne to 1712 various disputes occurred between the colonists and the crown and governor respecting recognition of affirmation; the right was asserted by the legislature for the third time in 1710. Wise and Brockden, app. 2, pp. 43, 46, 50; 1 Votes of Assembly, part 2, p. 130; Proceedings of Council, 517.

In 1712, the Act of Assembly was passed permitting religious societies to purchase ground, &c., and declaring that gifts should go according to the intentions of the donors. The Assembly remembered Baxter's case, and intended to prohibit the doctrine of *cy-pres*. Whether dissenters were tolerated was discussed till 1755. Smith's History of New York, chap. 4, pp. 213, 255, 257.

By the 8 George I., chap. 6, Quakers were allowed to affirm. Various occurrences took place between 1719 and 1730 when the Act of that year was passed, narrowing the ground of prior Acts. In 1730, in the case of Christ Church, an opinion was given by counsel recognizing the law of charitable uses.

In *Remington v. The Methodist Church*, this Act was construed and a trust for the general Methodist Church held not to be good, because it was not for the benefit of citizens of Pennsylvania.

In 1776, the first Constitution of Pennsylvania, (Smith, 430,) brought charitable uses under the protection of the fundamental law. Sect. 45 says all religious societies and bodies of men for advancement of learning or good and pious uses shall be encouraged and protected in their property, &c. No Act of incorporation was necessary, because it says, "united or incorporated" for "learning" as well as "religion." The people had been struggling for seventy-six years to obtain from the crown the privilege of holding ground for churches. It was a part of

their love of freedom. And now we are told that they have no rights except under the Act of 1730.

The Legislature made no corporation for any purpose whatever until 1768. 1 Smith, 279.

The proprietary incorporated churches, because it was said they had lost legacies; and this was the apology to the crown for going against the English policy. There was only one attempt to destroy a charitable use before the Revolution. In 1769 a will gave a legacy to an hospital and the poor, to two corporations, Christ Church and St. Peter's. The heir brought an ejectment in 1776, and the church took the opinions of Wilcox and Wilson, both of whom affirmed that the bequest was good at law. In 1779, the cause was ended without a decision of the question. These corporations were established in 1765 and became trustees for others. The property held is now of great value, and the trust is still kept up without any mismanagement.

After the Act of 1730, the governor said in 1734 that there was a Catholic church in Philadelphia where mass was said contrary to law; but the Assembly replied, that in the colony there was a toleration of all religions, and there the matter ended. Worship is held there now.

The city of Philadelphia still holds and administers Franklin's legacy; and so of those of Kirkpatrick, Blakeley, Scott and Boudinot. There are two other legacies, and the Freemason's Lodge gave a sum of money, all of which are now administered. There is a separate book, called "Devises and Grants."

Are all these to be broken up?

The spirit of the statute of Elizabeth is extended to Ireland. 4 Dana's Abr. 5, 6; Shelford, 60.

They are also in Pennsylvania as part of the common law; bequests for pious uses are made by all descriptions of persons, no matter how uncertain the objects of the charity may be. The Quakers have held their schools through trustees, and never been incorporated since the settlement of the colony. See 3 Watts, 440.

See 5 Watts, 493, where a trust for a school was said to be "vague and uncertain;" but the court said not, "for the neighbors got the benefit of it." Charity-schools have been favorites in the State, sustained by usage, without any reference to the statute of Elizabeth.

Manuscript case of Zimmerman decided in the Supreme Court of Pennsylvania, on 6th January, 1844, where there was a bequest to an

incorporated society for the benefit of poor orphans, and the court said it was good under the Constitution, although the statute of 43 Elizabeth is not in force.

7. The American cases are as follows: 12 Mass. 537, 546; 9 Cranch, 292, 43; 9 Cow. 427, 437; 2 Pet. 566; 3 Id. 501; 3 Shotwell, 9; 3 Paige, 300; 16 Pick. 107; 6 Paige, 640; 7 Id. 77; 7 Vt. 241; 4 Dana, 354; 3 Edw. 79; 1 Voss, 96; 20 Wend. 119; 24 Pick. 146; Hoffm. 202.

The Virginia and Maryland cases are not cited because they followed the rule laid down by this court in the case of the Baptist Association.

Sergeant, on the same side.

The condition of the law in England and Pennsylvania has been well examined. Lord ROSLYN has said that Chancery did not take cognizance of charitable uses before the statute of Elizabeth, but Lords REDESDALE and ELDON say otherwise. ROSLYN is known to us as the insulter of Dr. Franklin, and now the same great people whom he represented, are harassed because this same Lord ROSLYN doubted about the statute of Elizabeth. When the rubbish of three centuries is swept away and the old records of England brought to light and published, there is evidence enough that the law of charities before the time of Elizabeth was the same that it is now in Pennsylvania. But the counsel on the other side complain that they cannot understand the law of Pennsylvania. It is not necessary that they should; for all that is asked by us is, that she may be suffered to enjoy the contributions of her own wise and good, accumulating from the time that the first white man came there to settle with the Bible in his hand. Girard came there after the Constitution of 1776 and before that of 1791; he lived in an atmosphere of charities in Philadelphia; he saw Franklin's charity established and upheld by law, administered by the city, and never heard its validity questioned. No tribunal in the State was ever asked or would be permitted to question Franklin's charity. Girard knew where to find the best legal advice, and undoubtedly had it. In Pennsylvania no argument would be listened to, such as we have heard here. We are invited to explain the law by those who do not want to understand it. It has been said by the other side, that no law can be considered as settled which has not been mooted; that is, that if all the courts, for an indefinite period, decide in the same way, it is of no

account unless some ingenious and subtle mind calls the law into question. In one case, this court waited for the State court in Ohio to expound its laws, and then followed the decision. In another case, the court in Tennessee construed its laws; this court adopted it. The court in Tennessee reversed its decision; this court did so too. The present is a question of Pennsylvania law, and we have heard the last decision of its highest State court in January, 1844, read from the manuscript report. This concurs with all previous decisions; and yet the counsel on the other side say that they want a fixed system of law. Virginia and Maryland are the only two States where the law is otherwise, and they followed what they understood to be the decision of this court in the case of the Baptist Association. The question is not whether the Pennsylvania law is right or wrong, for we do not wish to impose it upon any one else. But the only question is, what does the law of Pennsylvania say upon the point. Girard's will was made by the advice of the best counsel that could be found; it was proved as soon as he died; the executors went on to perform their trust, in presence of the proper courts and with universal consent; they paid large sums over to the city. The claimants then brought an ejectment, and exhibited this will to the Supreme Court of Pennsylvania, who found no objection to it. The city of Philadelphia brought a suit under it for some property; no judge nor counsel ever hinted that the will was void. Five years passed. The legislature had passed a law immediately recognizing the will as existing and valid in all its parts. The preamble does so. In the case of the Town of Pawlet, Mr. Justice STORY says, "the crown has recognized the existence of the town." Does the recognition of this will by the legislature go for nothing? The capacity of performing certain acts is admitted by the legislature, and is this not as effectual as a recognition by the crown? Ten charities are going on now in Philadelphia. Custom and usage make the common law of England. Why has not Pennsylvania a right to enjoy her common law, not imported in parcels and packages from England, but modified and altered by circumstances and made suitable to the people?

If we are not strong enough to stand alone, we might ask support from the other States whose law is the same with ours. Where did the doctrine of charities spring from? and from what quarter did it enter into the heart of man? We are authorized to denounce as an infidel or worse, the man who hath not charity in his heart. As surely

as the pilgrims acknowledged a higher power, so surely did they recognize the obligation to take care of their fellow-creatures. The people of the State are now a hospitable and charitable people, and woe be to him who endeavors to intercept the flow of the current. Where money is given to the poor, is any one at liberty to take it? Thou shalt not steal. This is property under the protection of the court, and the right to it as sacred as that of any man to the enjoyment of his own. The voice of Pennsylvania is accordant and unbroken. We are called upon to examine what the Chancellor did before the 43 of Elizabeth, three centuries ago; but this does not concern us. It is now settled even there, that no charity shall fail; if it is indefinite, the king shall administer it. Whether there are trustees or not, whether there be a corporation or not, all take. This charity would be safe in England; and yet it is said we must lose it unless we can show how matters were conducted three hundred years ago. This is a heavy burden to lay on a charity. In Pennsylvania, as in England, the law of charity established itself. No man can say when it began; it has always existed as far as we know. What is the common law of England? Leaving out its being the perfection of reason, it is such an application of rules as will promote the welfare of society. The law of charity has existed in England for sixteen hundred years, some centuries before Alfred. Before Penn came over, there was a settlement of Swedes near Philadelphia, at Weccacoe, a brave and moral people. They built a place of worship, and about 1700 a better one which remains to this day. The charter of that church bears date in 1765, but the first church was built in 1677. Where was the law of charities for these hundred years? and what protected the graves around the church all this time? The same law that exists still. Christ Church was seventy years without a charter. In Walnut Street there was a chapel abhorrent to English law, where mass was said. It stood until it was taken down and replaced by a larger one. Who ever offered to take away this church? What is the condition of the Philadelphia Library with its 50,000 volumes? It has always acted without a charter. STORY supposes that the rudiments of this law of charities came from the civil law. THURLOW and ELDON thought so too. In 1138, the civil law came into England, and the canon law soon afterwards, and is part of the law of that country to this day. But how did it get into the civil law? It is said from Constantine. But wherever Christianity went, charity went too. Gibbon

says "the apostate Julian complained that Christians not only relieved their own poor, but those of the heathen also." The revealed law is part of the law of England. BLACKSTONE says so. When did Christianity come into England? It reached Rome in the time of the Apostles, where Paul and Peter both suffered. But when England? Some say at the same time that it was carried to Rome, and was there trodden down for a time. The latest period is 597, the arrival of Augustine. An archbishop of Canterbury was then appointed, and there has been one ever since. If Christianity carried the law of charity to Rome, it must have done so to England too. It was a part of the common law after the sixth century. Where is there a spot upon earth, where Christianity is found, that the law of charity does not exist also? Alfred sent an embassy to the Christian churches in Syria, in the ninth century, and had the ten commandments translated into Saxon. From one great source have flowed two sorts of charities, one religious, the other more general. The only difficulty that ever existed in Pennsylvania related to the first class—religious charities. In the 14th century lived Wickliffe, called the day-star of the Reformation; a man confounded with turbulent men, but a professor of divinity and singularly learned. It was an object in that day to save England from paying tribute to the pope. From that time a religious struggle ensued. Henry VIII. found the Roman Catholic religion firmly established, the revealed law being part of the law of England. All parties admitted this. From the time of Augustine down, the common law had been undergoing changes to suit the spirit of the age, but the revealed law was a part of it all the time. Tothill, 126, quoted by Judge BALDWIN in McGill and Brown. To this same great source we owe the idea of a paternal power in the State—a *parens patrice*—not the king, nor the Chancellor, but a power existing somewhere to take care of the sick, the widow, and the orphan. Take this away and we become a nation of savages. If there is no protection for the infant and the aged, the charm of civilization is lost. In Pennsylvania all this is cared for; by hospitals and houses of refuge. No power is able to stop the flow of charity, because there is liberty of conscience. The same law that enjoins upon a witness in court to tell the truth, instructs him to give to the poor. One is not less binding than the other. All that is asked of government is, that under the protection of law, the great duty of charity may be fulfilled; and it is proposed now to say to every one

that he shall not do so ; that his gift shall be forfeited. The law of charitable uses furnishes this protection. In the 17 Edward II., in 1324, the Knights Hospitallers were made new trustees of a charity when the Templars were dissolved. Story (Equity, 403, 412) says, that charities are liberally construed, and in 415, "if the bequest be for charity, no matter how uncertain the beneficiaries may be, a court will sustain the legacy." See also 3 Pet. 484; 4 Wheat. 41; 7 Vt. 289.

A bequest is not void for uncertainty of persons. 7 Cranch, 45; 2 Story, 206; 6 Pet. 436, 437; 2 Id. 256.

The law of charities existed in England prior to the time of Elizabeth. 2 Russ. 407.

The opinion given by Judge BALDWIN in the case of McGill and Brown, embraces all the law of Pennsylvania. The law of this court is not different. The two cases cited in the decision of the Baptist Association appear now to be reported differently in five different books, and this court afterwards said that a dedication to pious uses should be protected. The case of the Baptist Society is reported in 3 Peters. If the counsel on the other side construe this case rightly, then all charitable uses are swept away ; but how then did it happen that Chief Justice MARSHALL afterwards said that eleemosynary corporations are to be encouraged. There cannot be a right without a full remedy ; and if a man has a right to give, his donation must be protected.

The Constitution of 1776, sect. 46, says, "all religious or charitable societies ought to be encouraged and protected." What does the 43 Elizabeth do ? It directs charities to be looked up, amounting to twenty-one. Is not the fundamental law of a State of as much potency as a British statute ? The latter only looks to the past ; the former to the future. The statute only includes twenty-one ; the Constitution takes in all. It says "other pious and charitable purposes." These words must be understood under their appropriate sense, according to their meaning in England at that time. It is of higher authority than the British statute, because it prohibited the legislature from doing any thing contrary to the principle which it established. The Constitution is a great landmark ; no one can dispute its authority without treating the people of Pennsylvania with disrespect. In Beatty and Kirk, (580,) the court say "the bill of rights of Maryland recognizes the statute of Elizabeth to some extent." Why is not a recognition to the full extent by Pennsylvania equally valid ? Pennsylvania even adopts "supersti-

tious uses," as they are called in England. Her settlers were of every shade of opinion.

The monasteries of England were seized upon by Henry VIII., but the rapacity of his favorites was even greater than his own. England presents now a great contrast of rich and poor. Some of the largest fortunes are owing to the benefactions of this king, such as that held by the family of Russell. The owner of the "poor flat, Bedford level," complained that Burke received £300 a year. Religious supremacy was established in the king. He laid down six articles, containing the points in dispute between himself and Rome. Who can tell what was then held to be "a superstitious use?" At the end of the Reformation, it was punishable to believe what the statute of 31 Henry VIII. ordered. The test of "superstitious uses" was constantly changing down to the time of Charles II.; the Presbyterians, Independents, &c., when uppermost, all trying to compel conformity. Then our ancestors came, abhorring religious supremacy, bringing with them liberty of conscience, and the whole law of religious charities. They asked the crown to give them religious endowments, but not charities, and were at last compelled to take the Act of 1730. Churches of all sects had been built, even Roman Catholic. In Magill and Brown, page 55, note, Judge BALDWIN mentions forty-six charities, none of which were religious. The statutes 23 Henry VIII., chap. 19, and 13 Elizabeth, chap. 1, make decrees of synods a part of the law of the land.

The Pennsylvania Act of 1791, (Purdon's Digest, p. 181,) recites that any persons who mean to associate for the purposes of charity, may be incorporated with the approbation of the attorney-general. There never has happened a case where the property of any religious society, Jew or Catholic, was seized upon.

There are two objections made to the validity of the devise.

1. That the proposed system of education is unchristian.
2. That the beneficiaries are too uncertain.

As to the first, all conscientious scruples, honestly entertained, are entitled to great respect. If any man who has charge of an orphan boy is afraid to send him to the college, he may keep him away without censure. It is merely an invitation to come. The Constitution of Pennsylvania respects all scruples of conscience, and if children were to be dragged in and kept by force, it would be a violation of its principles. But the will in effect says, "obey conscience and yield it to

nobody." This scruple is of recent origin. It is not alleged in the bill. Perhaps the complainants felt no scruples then, but do now. If they slumbered so long, they ought to have some charity for Mr. Girard, in whose breast they never awaked. But a great prize is now to be reached, and the judgment may be affected by the will. Two things must be made out to overthrow the devise upon this ground :

1. That it is a superstitious use.
2. That it is inseparable from the trust.

The question is more suitable to a theological board than a court of justice. That the law of charity is the law of the land, is not a proposition depending upon theological inquiry. In Baxter's case, the court was not called upon to say which party was right, but only to decide what it was that the statute said; and because Baxter was a non-conformist, the trust was declared void. What could a Pennsylvania judge have done in such a case? He would find liberty of conscience established by the constitution; that in the Constitution of the United States it is provided that Congress shall make no law affecting religion; and that Mr. Madison once affixed his veto to a bill incorporating a church under an apprehension that it trenched upon this delicate ground. It never was held that a charitable devise must make provision for religious education. In the list of forty-six before cited, thirty-seven are for mere charity. Does any one desire that the old times in religion should return, when a man was allowed to do good only in a particular way, and in no other? What was the spirit that led to burning the convent near Boston? Precisely this. Religious acrimony now destroys property, if it does not doom to the stake.

We have nothing to do with Mr. Girard's religious opinions. If any one thinks he can lead a better life, with equal humility and more zeal, let him try. Instead of there being anything against religion in the will, there is a manly and unaffected testimony in its favor. The boys are directed to "adopt such religious tenets as mature reason may prefer;" any tenet, without exception. The will then holds religion to be inseparable from human character, but thinks the best way of forming that portion of the character is by attending to it at mature age. It is a speculative question. Can it be said that Girard had no respect for religion? He showed a religious heart by bestowing upon the poor what God had given him, so that, like Franklin's legacy, "it might go round." His desire was that the children should be educated in the

manner which he thought the best, to make them religious. Who is to decide whether it is the best way or not? The objection assumes that the Bible is not to be taught at all, or that laymen are incapable of teaching it. There is not the least evidence of an intention to prohibit it from being taught. On the contrary, there is an obligation to teach what the Bible alone can teach, *viz.*, a pure system of morality.

Is it true that ministers alone can teach religion? The officer at the head of the institution (Professor Bache) is a religious man. Can he not expound religion as well as science to his pupils? The laymen are the support, at last, of all churches. The next position will be that clergymen are responsible for everything, and that a man can do nothing for himself. Every one has to teach his own children. Why can he not equally instruct those of other people? The orphans are not to enter the college until a contract is made for them by somebody. According to the common law, an infant can bind himself to some extent by a contract. So he can here. It must be sanctioned by his guardians too. No one objects to a child being bound out in a vessel where, of course, there is a great chance of his dying without the benefit of religious services, and where his voice, when in extremes, cannot reach an ear which, it is said, it ought to do. We must, upon this doctrine, condemn the House of Refuge. But we may trust that the cry of a child will be heard in mercy, although it may not reach the ear of a priest. If a father should refuse to instruct his children in religion, can the State interpose? Suppose that the will had made no provision on the subject, and the governors of the college had adopted this same regulation, would the court have denounced it as a violation of their duty? The case of the University of Virginia is far beyond this. There is no professor of theology, no instruction in divinity. These things are purposely omitted, from a fear that the institution might become sectarian. If Virginia permits it, she is the judge of its propriety and not we. But Girard has neither prohibited religious instruction nor a professorship. What will the United States do with the Smithsonian legacy? Congress cannot connect religion with it. Clothing and feeding the poor are worthy objects. Girard is said to have expressed himself in terms derogatory to Christianity. Suppose he had used a different phraseology, and said that none but laymen should be admitted into the college. This would not have been objectionable, and yet precisely the same result have been brought about. Children are to be fed

and clothed. This is not a superstitious use, and must stand. Will you destroy the patient, if there is an unsound limb? The case is left with the court with a perfect conviction that it will not put the knife to the throat of this most useful charity.

Webster, for the appellants, in reply.

The complainants in this cause are the next of kin to Stephen Girard, who come here to try the validity of a devise, purporting to establish what has been called a charity. The counsel on the opposite side have assailed their motives, accusing them of wishing to steal the bread of the orphan, and have censured them for coming to this court instead of resorting to the tribunals of Pennsylvania. The plaintiffs are foreigners, and have a right to come here under the Constitution of the United States. Are they to be reproached for it? But the answer to this objection has already been furnished by the opposite counsel, when they say that in Pennsylvania, the complainants would not have been permitted to question the devise. Here, they are sure of a patient hearing. The cause was not argued in the Circuit Court, because the question arose in that court in 1833, upon the construction of the will of Sarah Zane, and the court, in its opinion, decided the point. It would, therefore, have been useless to renew the argument there, but the best way was to bring the subject directly up for review.

It was said by the opening counsel (*Mr. Jones*), that in England charities are often superintended by the king in virtue of his prerogative, and that no analogous power can exist in a republican government, where there can be no *parens patriæ*; and it was also said that in order to establish a peculiar and local common law in Pennsylvania, one decision is not enough, but there must be a series of decisions to sustain a system of law. Both these positions are correct.

But the attention of the court will be directed in the first place to that clause in the will which excludes clergymen, &c., from the college; and it is worthy of reflection whether the devise must not be maintained, if maintained at all, upon the ground of its being a charitable devise, and as such entitled to special favor. It is a proposition of the highest magnitude, whether in the eye of jurisprudence it is any charity at all; the affirmative cannot be supported by law, or reasoning, or decisions. There are two objections to it.

1. The plan of education is derogatory to the Christian religion, tend-

ing to weaken men's respect for it and their conviction of its importance. It subverts the only foundation of public morals, and therefore it is mischievous and not desirable.

2. It is contrary to the public law and policy of Pennsylvania.

The clause is pointedly opprobrious to the whole clergy; it brands them all without distinction of sect. Their very presence is supposed to be mischievous. If a preacher happens to have a sick relative in the college, he is forbidden to visit him. How have the great body of preachers deserved to be denied even the ordinary rites of hospitality? In no country in the world is there a body of men who have done so much good as the preachers of the United States; they derive no aid from government, constitute no hierarchy, but live by the voluntary contributions of those to whom they preach. It astonishes the old world that we can get on in this way. We have done something in law and politics towards our contribution for the benefit of mankind; but nothing so important to the human race as by establishing the great truth that the clergy can live by voluntary support. And yet they are all shut out from this college. Was there ever an instance before, where, in any Christian country, the whole body of the clergy were denounced? The opposite party have gone as far back as Constantine in their history of charities; but have they found or can they find a single case, where opprobrium is fixed upon the whole clergy? We have nothing to do with Girard's private character, which has been extolled for benevolence. Be it so. We are asked if he cannot dispose of his property. But the law cannot be altered to suit Girard. What is charity? It is the indulgence of kind affections—love—sympathy for our fellow-creatures. In a narrow sense it means alms, relief to the poor. But the question is, what is it in a legal sense? The object here is to establish a school of learning and shelter; to give a better education. The counsel upon the other side are right in speaking of charity as an emanation of Christianity. But if this be so, there can be no charity where the authority of God is derided and his word rejected. If it becomes an unbeliever, it is no longer charity. There is no example in the books of a charity where Christianity is excluded. There may be a charity for a school without a positive provision for Christian teachers; but where they are expressly excluded, it cannot be such a charity as is entitled to the special favor and protection of a court. It is said by the counsel on the other side that Pennsylvania is not an infidel State, but a

Christian community; and yet children who are orphans, with no parents to look after them, are directed to be shut in to stay until they approach manhood, during the age when the character is formed, and if they happen to have any connections or friends who are clergymen, they are excluded from ever seeing them. There are two objectionable features in this restriction in the will. The first is, that all clergymen are excluded from the college; and the second, that a cruel experiment is to be made upon these orphans, to ascertain whether they cannot be brought up without religion.

[*Mr. Webster* here read a passage from one of the works of the late Bishop White upon this point.]

The doors of the college are open to infidels. The clause, as it stands, is as derogatory to Christianity as if provision had been made for lectures against it. If it be said that infidels will not be encouraged, the answer is, that a court can only judge of the tendency of measures. The trustees must not be supposed to violate the will. But it is said by the counsel that lay teaching can be substituted for clerical. There are at least four religious sects which do not allow this mode of teaching religion; and it is as much against the spirit of the will as teaching by clergymen. The object is to have no religious teaching at all, because in this way controversy will be avoided. Lawyers are as much sectarians as clergymen, and lay teaching leads as directly to controversy as lay preaching. The intention of the will is, that the boys shall choose their own religion when they grow up. The idea was drawn from Paine's *Age of Reason*, 211, where it is said, "let us propagate morality unfettered by superstition." Girard had no secrets, and therefore used the words which he considered synonymous with "superstition," viz.: "religious tenets."

Ministers are the usual and appointed agents of Christ. In human affairs, where the ordinary means of attaining an object are rejected, the object is understood to be rejected also; much more is this the case when the means are of divine authority. In the New Testament preaching is ordered both before and after the crucifixion. "If any man refuse to hear," &c. "Go ye into all the world and preach the gospel to every creature." Different sects have different forms of worship, but all agree that preaching is indispensable. These appointed agencies have been the means of converting all that part of the world which is now Christian. What country was ever Christianized by lay teaching?

By what sect was religious instruction ever struck out of education? None. Both in the Old and New Testaments its importance is recognized. In the Old it is said "Thou shalt diligently teach them to thy children," and in the New, "Suffer little children to come unto me and forbid them not." But this will requires religion to be put off till mature years, as if a knowledge of man's duty and destiny was not the earliest thing to be learned. Man is the only sentient being who knows that he is eternal; the question "If a man dies, shall he live again?" can be solved by religion alone.

Is this school a charity? What is to become of the Sabbath? It is not intended to say that this institution stands upon the same authority as preaching, but still it is a part of Christianity. All sects have a day which is holy, and hold its observance to be important. Lay teachers will not do. Where are the children to go to church, even if they go out of the college? There is no Christian father or mother who would not rather trust their children to the charity of the world at large, than provide in this way for their bodily comforts. The single example of the widow's mite, read as it has been to hundreds of millions of people, has done more good than a hundred marble palaces. No fault can be found with Girard for wishing a marble college to bear his name for ever, but it is not valuable unless it has a fragrance of Christianity about it.

The reasons which the testator gives are objectionable and derogatory to Christianity; they assume that a difference of opinion upon some religious tenets is of more importance than a Christian education, and in order to get rid of superfluous branches, they lay the axe to the root of the tree itself. The same objection is made by all the low and vulgar class of the opponents of Christianity. The first step of infidelity is to clamor against the multitude of sects. Volney, 84, (*Ruins of Empires*), says, "they all preach damnation against each other, and all cry out 'our holy religion.'" The opposite counsel say that Girard was in a difficulty, because if he had thrown open the college to all sects indiscriminately, they would not have agreed with each other. But if it had been so, these orphan children would not have been in a worse condition than other children, and what father would not have preferred that his children should go to this college under any form, than no form of religion? All sects believe in a future state and in a creator of the world. Suppose we carried out these principles of exclusion

into our social relations. Differing as we do about government, it would tear up society by the roots. All preachers unite in many points; they would all agree with Franklin, who is reported in the letters of John Adams to his wife, to have said in the days of trouble, "let us have prayers."

[Mr. Binney here cited the following authorities to show that Jewish charities can be sustained. 1 Amb. 228, note; 2 Swanst. 487; 7 Ves. 417; Shelford, 107; Boyle, 27.]

Mr. Webster said the distinction between the Jewish cases and the present is, that the former were within the ordinary rules of law, whereas this devise could only be sustained by being brought under the peculiar favor of the court, as it belongs to that class of charities. But what would be the condition of a youth coming fresh from this college? He could not be a witness in any court. He had never been taught to believe in a future state of rewards and punishments, because this is a "tenet" upon which he is enjoined not to make up his mind until he can examine for himself. What parent would bring up his child to the age of eighteen years without teaching him religion? What is an oath in heathen lands as well as our own? It is a religious appeal, founded upon a conviction that perjury will be punished hereafter. But if no superior power is acknowledged, the party cannot be a witness. Our lives and liberties and property all rest upon the sanctity of oaths. It is said that there will be no teaching against Christianity in this college, but I deny it. The fundamental doctrine is, that the youthful heart is not a proper receptacle for religion. This is not the charity of instruction. In monasteries, education was always blended with religious teaching. The statute 4 Henry IV., chap. 12, in 1402, established charities of religion, (2 Pickering, 433,) and directed the schoolmaster to perform divine service, and instruct the children. 1 Edward VI. chap. 14, to the same effect. 2 Swanst. 526, 529, says that care was always taken to educate youths in the doctrines of Christianity, which is a part of the common law of England. That it is so, see 1 Benson, 296; 2 Str. 834; 3 Meriv. 405; 2 Burn's Ecclesiastical Law, 95; 2 Russ. 501; Younge & Coll. C. C. 413, *Attorney-General v. Cullum*, a full authority.

In this last case, there was a charity for the use of the parish, but no provision for religious education. The court said that if the fund were to be applied to education at all, a part of it must go to religious

education ; not the particular doctrines of the Church of England, but religion in a more comprehensive sense.

Bache, in his Course of Education in Europe, describes a monitorial school in Liverpool upon Bell's plan, but divine service is performed every Sunday. In Shep. Touch. 105, the cases are summed up.

As to the Smithsonian legacy and the University of Virginia, the former is not carried out, and the latter is no charity. Upon this branch of the case the whole argument may be presented in the following question, "Is a school, founded clearly on the principles of infidelity, a charity in the appropriate sense of that word?"

2. What is the law or public policy of Pennsylvania?

If there be a settled policy there, no gift or devise to overturn it can be recognized. It is an independent State, a popular government recognizing all guarantees of popular liberty. It is lawful to speak or write against all these guarantees, such as trial by jury, &c., but if the aid of a court be asked to carry on these attacks, it will be refused.

Mr. Girard in his lifetime might have paid people to write against the right of suffrage, but it is a different thing when it assumes the shape of a charitable devise, and requires the strong aid of a court to carry out the design. The Christian religion is as much a part of the public law as any of these guarantees. The charter says that Penn came over to spread the Christian religion ; and the legislatures have often acted upon this principle, as where they punished the violation of the Lord's day. That it is a part of the common law, see 11 Serg. & R. 394, *Updegraff v. The Commonwealth*. So the court set aside a trust because it was inconsistent with public policy. See the case of the Methodist church, 5 Watts. The policy of a country is established either by law, or courts, or general consent. That Christianity is a part of the public law of Pennsylvania by general consent, if there were no other source of authority, the churches, meeting-houses, spires, and even grave-yards over the face of the country all show. The dead prove it as well as the living.

If the trust cannot be executed, can it be reformed?

Who is to do it? The doctrine of *cy-pres* cannot apply and give the benefit to some other society. It would be an extravagant application of the doctrine. Who is to supply the place of the trust stricken out? The trustee cannot. It is a case where there is no doubt of the intentions of the testator. They are positive. In other cases there is

room for discretion, but none here. The testator calls these articles restrictions and limitations. Courts of equity have gone to an extravagant length in *cy-pres* cases, but it is impossible to reach this.

7 Ves. 490, said that if authority were out of the way, the gift would be void, and the case be one of intestacy; but the court thought itself bound to follow authority and decree that the testator should be charitable in the court's way. See also Str. 127, *Attorney-General v. Dowling*. But the entire doctrine of *cy-pres* is rejected by the Pennsylvania courts. See 17 Serg. & R. 93; 1 Watts, 226.

As to the second division of the argument of the case, what is the law of Pennsylvania with respect to such devises?

This court will adopt the construction which the courts of a State place upon its laws. 2 Cranch, 87; 11 Wheat. 361; 2 Pet. 58; 6 Id. 290; 12 Wheat. 153. There have been four cases decided in Pennsylvania, viz.: 17 Serg. & R. 88, *Witman v. Lex*; 1 Pa. 49, *McGirr v. Aaron*; 3 Rawle, 170, *Mayor, &c. v. Elliott, &c.*; 1 Watts, 218, *Methodist Church v. Remington*. All these cases are in our favor, except a single *dictum* in one of them. The opposite counsel are obliged to reject the points decided in two. In the first case it was decided that the statute of Elizabeth was not in force, and the devise was not so uncertain as to be void. The second was a gift to a congregation for a house of religious worship; in the third there was no uncertainty in the *cestui que trust*, and in the fourth the trust was declared void.

The old records of England do not militate against the decision of this court in the case of the Baptist Association. (4 Wheat. 1.) There is believed to be no case in them of an indefinite charity in perpetuity sustained by the authority of chancery prior to the time of Henry VIII. Corporations competent to take, whether aggregate or sole, are not included within this remark. Decisions before the 43 Elizabeth are apt to be misunderstood, because the term "charity" is applied to cases where there is no uncertainty. 1 Proceedings in Chancery, 208. Of the fifty cases cited from the old records, only three are given at length; in one of which the objects of the trust are specially declared, and in the other two there was a license from the king. All the cases referred to did not take place before the time of Elizabeth.*

* The following remarks upon the old records of England, were hastily drawn up and presented to the court by Mr. Cadwalader, one of the counsel for the complainants:—

The new information developed by the researches of the counsel of the appellees,

The acts of the legislature of Pennsylvania after the death of Girard can have no effect upon the rights of parties which were then vested.

The case in 3 Pet. 99, 115, *Inglis v. The Trustees of the Sailor's Snug Harbor*, rested upon the ground that the devise was good as an executory devise.

upon the obscure subject of the law of charities before the statutes 39 and 43 Eliz., tends rather to confirm than to invalidate the opinion of this court expressed in the Baptist Church case, that there is no satisfactory evidence of an uncertain charity of indefinite duration having been enforced before the statute, or since the statute without its aid.

Cases of frankalmoigne, the Templars, the Hospitalers, &c. &c., were those of corporations sole or aggregate. Counsel on both sides concur that the dissolution of monasteries, and of certain ecclesiastical aggregate and sole corporations, and the recusancy and consequent disfranchisement of many incumbents of benefices of this description, had, by the time of Elizabeth, caused many charities, previously valid, to fail for want of their anterior support of corporate trustees or administrators. The recitals and enactments of the statutes of this and the previous reigns, and particularly of the 39 and 43 Eliz. may be explained by a due regard to this portion of the previous history of England. This is affirmed on both sides of the argument. It is not perceived that any just reasoning on this foundation tends to support the proposition that indefinite uncertain charities could subsist without the aid of an incorporation. On the contrary, the natural inference appears to be, that they could not be otherwise maintained, without statutory assistance.

Judicial recognitions of charities before 39 and 43 Eliz. are liable to be misapplied, unless due care be observed in ascertaining the definition of a charity as understood at that day. The cases in which nothing more is said than that the trust, or use, or purpose was a charitable one, prove nothing. Whatever the true modern technical definition may be, the passages cited from Reeves's History prove, that the term charity in the olden time was frequently applied to trusts which were neither uncertain in their objects nor perpetual in their duration; in other words, to subjects for which a trust could have been maintained according to the ordinary rules of property, as contradistinguished from the rules of charities. *Edwards v. Kimpton*, read from (Record Commission) 1 Calendar of Proceedings in Chancery, 280, was the case of a rent granted for the relief of the converts inhabiting the house belonging to the Master of the Rolls. In *Lyon v. Hews*, same publication, vol. 2, p. 44, both bill and answer mention works of charity as the objects of the trust to be enforced, and state that the property had been left for religious and charitable purposes. But the purposes and objects of this trust were specifically declared, and were, 1st. Finding a priest by a year in a certain church; 2d. Making an aisle in the porch of the same church; 3d. Marriage of five poor maidens; and 4th. Amending the highways in the lane behind the mews. Of these uses none was to be extended to a perpetuity, and none was in any greater degree uncertain than must necessarily be the case with objects of a power or discretion exercisable within the period of a perpetuity. So in Alderman Symond's case, in Moore's Readings, Duke, 163; the "charitable use," decreed before the statute, "upon ordinary and judicial equity in chancery," though

If the devise in trust be void in this case, what becomes of the fee? It must rest [vest?] somewhere. In England, where a devise was made to a corporation which could not take, the fee was decided to be in the heir at law. Hob. 136. But where a court of chancery charges itself with the whole administration of the charity, it takes possession of the

not described as to its objects, appears to have been one of which a final disposition could be made within a reasonable period. The case in 38 Assizes, 222, (a) vol. 3, was one in which the distribution, for the good of the testator's soul, was to be made by his executors; *i. e.*, within a life in being. Of the fifty cases quoted from these Calendars, three only are stated at length. Of the rest nothing more than a meagre abstract is presented. Of the three which are given at large, one, *Lyon v. Hews*, is mentioned above. In each of the two others, a patent or license had been obtained from the crown, enabling the trustees to hold the land conformably to the provisions of the trust. In many of the other cases, the proceedings, if given in full, would doubtless indicate the same thing. The statutes of mortmain must otherwise have prevented the grants from being available. One of the cases mentioned in the Calendar, vol. 2, p. 264, *Newton v. Kitteridge*, a bill to protect the complainant's title against an inquisition for charitable uses, by which his land had been found to have been given to the poor of Aldham, certainly occurred after, and was founded on the 43 or 39 Eliz. The same thing is probably true of very many of the others of which the date is not given. It is remarkable that although all of the cases in the Calendar on various subjects are entitled as of the reign of Elizabeth, or of earlier reigns, some of them, in the places where abstracted, are stated to have occurred during the usurpation, and others at dates in the reign of James I. Of all the cases in the Calendar, only seven, including the three above mentioned, are shown to have occurred before the statute 39 Eliz. But all this is perhaps unimportant here. Upon such examination as has been practicable, it is apprehended that none of the cases previous to 39 Eliz., and none of those of uncertain date, can be said affirmatively to have been instances of indefinite perpetual charity.

To understand some of them it is necessary to refer to 1 Edw. VI., c. 14, which made masters of grammar schools corporations sole; and to understand a larger number of them, it will be right to refer to the doctrine which prevailed before the statute of Elizabeth, under which, gifts of chattels to the poor of a municipal or religious corporation, were sustained as gifts to the corporation; a doctrine which affirms the competency of the corporation, and the incapacity of the poor. This doctrine is thus laid down in the note to the case in 38 Assizes, mentioned above. It is there stated to have been the opinion of the court that if a man give bond or other thing, to A. and B., parishioners of a certain church, and to the parishioners of the said church, the gift is good, and it vests in the church, &c. The same doctrine, in those days, was held in the case of land where there had been a license or dispensation with the mortmain Acts. Of course the same rule applied where there was a trust for a corporation, or for its poor, or its members. If the purposes of the grant were consistent with the objects of the charter, the gift could be sustained independently of the peculiar law of charities. Now, with the exception of four or five instances where the charity does not appear to have been of undefined

fee as an incident to this power. In Pennsylvania there is no such authority anywhere, and this court cannot exercise it. What is done in England is done by virtue of the statute of Elizabeth, which has no force in this case. Suppose the corporation had renounced the trust, what would have become of the fee? Could the court in such case have divested the heirs of the fee and appointed another trustee? There is no power to remodel a trust, as in England, or to exercise a right of visitation.

There is a want of power in the trustees to administer the charity. The fee must rest in the entire body of the corporation whilst others are administering the trust. It is true that sometimes trusts have been conferred on the heads of corporations, and the whole body been held responsible. But the will here can give no power. There is no connection between this trust and the powers of the corporation. The school is out of the city, and the only interest which the city has in it is that some of the poor may be provided for. But suppose a defalcation to take place. The mayor, &c., are chosen for the purpose of laying city taxes for city purposes. Can they levy a tax to replace the sum thus abstracted? Are the whole people of the city responsible by taxation for an abuse of trust? Yet they are a part of the corporation which is the trustee. The 16th section of the charter contains the power to hold land, but this does not go far enough. If the city cannot execute the trust, what becomes of it? It was the intention of the testator that a particular trustee and no other should execute it, and if that trustee is incapable of doing it, the trust must fail altogether.

By the Pennsylvania statutes of 1730, 1791, and 1833, the policy of the State is shown to be that a moderate limit is fixed for the amount of property held for religious or charitable purposes, first of £500, and afterwards \$2000. These laws are intended to act upon just such devises

dURATION, AND OF WHICH THE DATE, WHETHER BEFORE OR AFTER THE STATUTE 39 ELIZ. DOES NOT APPEAR, IT IS BELIEVED, SUBJECT TO CORRECTION, THAT IN ALL THE CASES CITED FROM THIS CALENDAR, AND NOT ALREADY PARTICULARLY NOTICED, THERE HAD BEEN A GRANT OR DEVISE TO, OR IN TRUST FOR, A MUNICIPAL OR PRIVATE CORPORATION; AND IN MOST INSTANCES THE PROCEEDING WAS BY, OR ON BEHALF OF, SUCH A CORPORATION. THESE CASES, THEREFORE, FURNISH STRONG NEGATIVE EVIDENCE THAT THE LAW BEFORE THE STATUTES 39 AND 43 ELIZ. DID NOT REST ON THE SAME FOOTING AS IT HAS SINCE STOOD UPON. IF IT HAD BEEN THUS ESTABLISHED, THE TRUSTEES FOR THE INHABITANTS OF A MUNICIPALITY, OR FOR THE POOR OF A PARISH OR A CHURCH, WOULD NOT HAVE NEEDED THE PROTECTION OF THE CORPORATIONS AND *QUASI* CORPORATIONS, UNDER WHOSE CAPACITY TO TAKE AND TO ENJOY, THEY APPEAR TO HAVE THOUGHT IT NECESSARY TO SHELTER THEMSELVES.

as this. Can it be said, with these laws in view, that an unincorporated body, such as these boys, or any one in trust for them, can hold property to the amount of \$2,000,000? The policy of the State is to prevent large amounts in perpetuity, and if any one desires to exceed the limits fixed in those laws he must apply to the legislature for a special permission. Constitution of Pennsylvania, sect. 37; Purdon's Digest, title Estates-tail.

Where is the supervisory power over this trust? In 2 Vesey, 43, *Attorney-General v. Foundling Hospital*, it is said that Chancery must supervise. When it is given to a corporation with power to trustees to go on, there is no need of a supervisory power except to protect the fund. 2 Bro. C. C. 220, 236.

In 17 Ves. 409, it is said that if there are no visitors appointed in the charter, the Chancellor interferes to visit, through a petition addressed to him as keeper of the great seal, representing the king in person. But there is no such power to be found any where in Pennsylvania. Girard should have provided for a charter, and the legislature could have seen how much property was going into mortmain and directed accordingly.

The city is incapable of executing this trust, because it cannot make contracts beyond the range of its charter. Suppose the trust should not be faithfully carried out by any agents, and the corporation be held responsible. In Pennsylvania, in case of a judgment against a corporation, any money on its way to the treasury can be arrested. In Bridgeport, Connecticut, the corporation issued bonds upon which there was a judgment, and private property in dwelling-houses seized in execution; yet these persons could not prevent the bonds from being issued. There is no security anywhere for any species of property except by holding corporations to a strict exercise of their power. No good can be looked for from this college. If Girard had desired to bring trouble, and quarrel, and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to that result, it will be the crowning mercy of my professional life.

Mr. Justice STORY delivered the opinion of the court.

This cause has been argued with great learning and ability. Many topics have been discussed in the arguments, as illustrative of the prin-

cipal grounds of controversy, with elaborate care, upon which, however, in the view which we have taken of the merits of the cause, it is not necessary for us to express any opinion, nor even allude to their bearing or application. We shall, therefore, confine ourselves to the exposition of those questions and principles which, in our judgment, dispose of the whole matters in litigation; so far at least as they are proper for the final adjudication of the present suit.

The late Stephen Girard, by his will dated the 25th day of December, A. D. 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, proceeded in the twentieth clause of that will to make the following bequest, on which the present controversy mainly hinges. "XX. And whereas I have been for a long time impressed," &c. [See the statement prepared by the reporter.]

The testator then proceeded to give a minute detail of the plan and structure of the college, and certain rules and regulations for the due management and government thereof, and the studies to be pursued therein, "comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages," (not forbidding but not recommending the Greek and Latin languages,) "and such other learning and science as the capacities of the several scholars may merit or warrant." He then added, "I would have them taught facts and things rather than words or signs; and especially I desire that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience as guaranteed by our happy constitutions shall be formed and fostered in the minds of the scholars."

The persons who are to receive the benefits of the institution he declared to be, "poor white male orphans between the ages of six and ten years; and no orphan should be admitted until the guardians or directors of the poor, or other proper guardian, or other competent authority, have given by indenture, relinquishment or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan every proper restraint, and to prevent relatives or others from interfering with, or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in

the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly, to those born in the city of New York; and lastly, to those born in the city of New Orleans." The testator further provided that the orphan "scholars who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age."

The testator then, after suggesting that in relation to the organization of the college and its appendages, he leaves necessarily many details to the mayor, aldermen, and citizens of Philadelphia, and their successors, proceeded to say: "there are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First, I enjoin and require," &c. [See statement of the reporter.] This second injunction and requirement is that which has been so elaborately commented on at the bar, as derogatory to the Christian religion, and upon which something will be hereafter suggested in the course of this opinion.

The testator then bequeathed the sum of \$500,000 to be invested, and the income thereof applied to lay out, regulate, and light and pave a passage or street in the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide and to be called Delaware Avenue, &c.; and to this intent to obtain such acts of Assembly, and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, &c. &c.: and he proceeded to give other minute directions touching the same.

The testator then bequeathed to the commonwealth of Pennsylvania the sum of \$300,000 for the purpose of internal improvement by canal navigation, to be paid into the State treasury as soon as such laws shall be enacted by the legislature to carry into effect the several improvements before specified, and certain other improvements.

The testator then bequeathed the remainder of the residue of his personal estate in trust to invest the same in good securities, &c., so that the whole shall form a permanent fund, and to apply the income thereof to certain specified purposes, which he proceeds to name; and then said: "To all which objects," &c. [See statement of the reporter.]

These are the material clauses of the will which seem necessary to be brought under our review in the present controversy. By a codicil dated the 20th of June, A. D. 1831, the testator made the following provision : " Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will ; and whereas, in particular, I have recently purchased from Mr. William Parker, the mansion-house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn Township : Now, I declare it to be my intention, and I direct, that the orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment, prescribed by my said will, as to said square, shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square of ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty of my will, it being my intention, that the said square of ground shall be built upon, and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section." The testator died in the same year ; and his will and codicil were duly admitted to probate on the 31st of December of the same year.

The legislature of Pennsylvania passed the requisite laws to carry into effect the will, so far as respected the bequests of the \$500,000 for the Delaware Avenue and the \$300,000 for internal improvement by canal navigation, according to the request of the testator.

The present bill is brought by the heirs at law of the testator, to have the devise of the residue and remainder of the real estate to the mayor, aldermen, and citizens of Philadelphia in trust as aforesaid to be declared void, for the want of capacity of the supposed devisees to

take land by devise, or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust; and because the objects of the charity for which the lands are so devised in trust are altogether vague, indefinite, and uncertain, and so no trust is created by the said will which is capable of being executed or of being cognizable at law or in equity, nor any trust-estate devised that can vest at law or in equity in any existing or possible *cestui que trust*; and, therefore, the bill insists that as the trust is void, there is a resulting trust thereof for the heirs at law of the testator; and the bill accordingly seeks a declaration to that effect and the relief consequent thereon, and for a discovery and account, and for other relief.

The principal questions, to which the arguments at the bar have been mainly addressed, are: First, whether the corporation of the city of Philadelphia is capable of taking the bequest of the real and personal estate for the erection and support of a college upon the trusts and for the uses designated in the will: Secondly, whether these uses are charitable uses valid in their nature and capable of being carried into effect consistently with the laws of Pennsylvania: Thirdly, if not, whether, being void, the fund falls into the residue of the testator's estate, and belongs to the corporation of the city, in virtue of the residuary clause in the will; or it belongs, as a resulting or implied trust, to the heirs and next of kin of the testator.

As to the first question, so far as it respects the capacity of the corporation to take the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The Act of 32 and 34 Henry VIII., respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The Act of the 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the Mayor, Aldermen, and Citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times for ever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects to them and their successors for ever, or for any other or less estate," &c., without any limitation whatsoever as to the value or amount thereof, or as to the

purposes to which the same were to be applied, except so far as may be gathered from the preamble of the Act, which recites that the then administration of government within the city of Philadelphia was in its form "inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby; it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established." Some, at least, of these objects might certainly be promoted by the application of the city property or its income to them—and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trust should not be deemed within the true scope of the city charter and protected thereby.

But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust. This will be sufficiently obvious upon an examination of the authorities; but a single case may suffice. In *Sonley v. The Clockmaker's Company*, 1 Bro. Ch. 81, there was a devise of freehold estate to the testator's wife for life, with remainder to his brother C. in tail male, with remainder to the Clockmaker's Company, in trust to sell for the benefit of the testator's nephews and nieces. The devise being to a corporation, was, by the

English statute of wills, void, that statute prohibiting devises to corporations, and the question was, whether the devise being so void, the heir at law took beneficially or subject to the trust. Mr. Baron EYRE, in his judgment, said, that although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named. Now, this was a case not of a charitable devise, but a trust created for nephews and nieces; so that it steers wide from the doctrines which have been established as to devises to corporations for charities as appointments under the statute of 43 Elizabeth: *à fortiori*, the doctrine of this case must apply with increased stringency to a case where the corporation is capable at law to take the estate devised, but the trusts are utterly dehors the purposes of the incorporation. In such a case, the trust itself being good, will be executed by and under the authority of a court of equity. Neither is there any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them; nay, for the benefit of a stranger or of another corporation. In the case of *Green v. Rutherford*, 1 Ves. 462, a devise was made to St. John's College, in Cambridge, the perpetual advowson of a rectory in trust, that whenever the church should be void and his nephew be capable of being presented thereto, they should present him; and on the next avoidance should present one of his name and kindred, if there should be any one capable thereof in the college; if none such, they should present the senior divine then fellow of the college, and on his refusal the next senior divine, and so downward; and, if all refused, they should present any other person they should think fit. Upon the argument of the cause, an objection was taken that the case was not cognizable in a court of equity, but fell within the jurisdiction of the visitor. Sir JOHN STRANGE (the Master of the Rolls) who assisted Lord HARDWICKE at the hearing of the cause, on that occasion said: "A private person would, undoubtedly, be compellable to execute it (the trust), and, considered as a trust, it makes no difference who are the trustees, the power of this court operating on them in the capacity of trustees. And though they are a collegiate body whose founder has given a visitor to superintend his own foundation and bounty; yet as between one claiming under a separate benefactor and these trustees for special pur-

poses, the court will look on them as trustees only, and oblige them to execute it under direction of the court." Lord HARDWICKE, after expressing his concurrence in the judgment of the Master of the Rolls, put the case of the like trust being to present no member of another college, and held that the court would have jurisdiction to enforce it.

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a State where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers.. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000 for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuylkill (an object which some thirty or forty years ago would have been thought of transcendent benefit), why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the State. We think, then, that the charter of the city does invest the corporation with powers and

rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania.

It is manifest that the legislature of Pennsylvania acted upon this interpretation of the charter of the city, in passing the acts of the 24th of March, and the 4th of April, 1832, to carry into effect certain improvements and execute certain trusts, under the will of Mr. Girard. The preamble to the trust act, expressly states that it is passed "to effect the improvements contemplated by the said testator, and to execute, in all other respects, the trusts created by his will," as to which, the testator had desired the legislature to pass the necessary laws. The tenth section of the same act, provides "That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary and convenient for the full and entire acceptance, execution, and prosecution of any and all the devises, bequests, trusts, and provisions contained in said will, &c. &c.; to carry which into effect," the testator had desired the legislature to enact the necessary laws. But what is more direct to the present purpose, because it imports a full recognition of the validity of the devise for the erection of the college, is the provision of the 11th section of the same Act, which declares "That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the trustees or directors of the said college, and approved by a majority of the select and common councils of the city of Philadelphia." The other Act is also full and direct to the same purpose, and provides "That the select and common councils of the city of Philadelphia, shall be and they are hereby authorized to provide, by ordinance or otherwise, for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard." Here then, there is a positive authority conferred upon the city authorities to act upon the trusts under the will, and to administer the same through the instrumentality of agents appointed by them. No doubt can then be entertained, that the legislature meant to affirm the entire validity of those trusts, and the entire competency of the cor-

poration to take and hold the property devised upon the trusts named in the will.

It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trusts ; and if those trusts were valid in point of law, the legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding, by which it should seek to divest the property, and invest other trustees with the execution of the trusts, upon the ground of any supposed incompetency of the corporation. And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts ; but this right would exclusively belong to the State in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a *quo warranto*, or other proper judicial proceeding. In this view of the matter, the recognition and confirmation of the devises and trusts of the will by the legislature, are of the highest importance and potency.

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth, ch. 4, has been adjudged by the Supreme Court of Pennsylvania not to be in force in that State. But then it has been solemnly and recently adjudged by the same court, in the case of *Zimmerman v. Andres* (January Term, 1844), that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force here by common usage and constitutional recognition ; and not only these, but the more extensive

range of charitable uses which Chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formerly promulgated in the case of *Witman v. Lex*, 17 Serg. & R. 88, at a much earlier period (1827).

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such an indefinite nature are not good at the common law (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges), and hence the charity fails; and the decision of this court in the case of the trustees of the *Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which State the statute of 43 Elizabeth, ch. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, ch. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights (certainly in no small degree shadowy, obscure, and flickering), the court came to the conclusion that, at the common law, no donation to charity could be enforced in Chancery, where both of these circumstances, or rather, where both of these defects occurred. The court said: "We find no dictum that charities

could be established on such an information (by the attorney-general) where the conveyance was defective or the donation was so vaguely expressed that the donee, if not a charity, would be incapable of taking." In reviewing the authorities upon that occasion, much reliance was placed upon *Collison's Case*, Hob. 136 (S. C. cited Duke on Charities, by Bridgman, 368, Moo. 888), and *Platt v. St. John's College, Cambridge*, Finch. 221 (S. C. 1 Cas. in Chan. 267; Duke on Charities, by Bridgman, 379), and the case reported in 1 Ch. Ca. 134. But these cases, as also *Flood's Case*, Hob. 136 (S. C. 1 Eq. Abr. 95, pl. 6), turned upon peculiar circumstances. Collison's Case was upon a devise in 15 Henry VIII., and was before the statute of wills. The other cases were cases where the donees could not take at law, not being properly described, or not having a competent capacity to take, so that there was no legal trustee; and yet the devises were held good as valid appointments under the statute of 43 Elizabeth. The dictum of Lord LOUGHBOROUGH in *Attorney-General v. Bowyer*, 3 Ves. 714, 726, was greatly relied on, where he says: "It does not appear that this court at that period (that is before the statute of wills) had cognizance upon information for the establishment of charities. Prior to the time of Lord ELLESMORE, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting, (an information to establish a college under a devise before the statute of mortmain of 9 Geo. II., ch. 36;) but they made out their case as well as they could at law." In this suggestion Lord LOUGHBOROUGH had under his consideration *Porter's Case*, 1 Co. 16. But there a devise was made in 32 Henry VIII., to the testator's wife, upon condition for her to grant the lands, &c., in all convenient speed after his decease for the maintenance and continuance of a certain free-school, and almsmen and almswomen forever. The heir entered for and after condition broken, and then conveyed the same lands to Queen Elizabeth in 34 of her reign; and the queen brought an information of intrusion against Porter for the land in the same year. One question was, whether the devise was not to a superstitious use, and therefore void under the Act of 23 Henry VIII., ch. 2, or whether it was good as a charitable use. And it was resolved by the court that the use was a good charitable use, and that the statute did not extend to it. So that here we have a plain case of a charity held good, before the statute of Elizabeth, upon the ground of the common law, there

being a good devisee originally, although the condition was broken and the use was for charitable purposes in some respects indefinite. Now if there was a good devisee to take as trustee, and the charity was good at the common law, it seems somewhat difficult to say, why, if no legal remedy was adequate to redress it, the Court of Chancery might not enforce the trust, since trusts for other specific purposes, were then, at least when there were designated trustees, within the jurisdiction of Chancery.

There are, however, dicta of eminent judges, (some of which were commented upon in the case of 4 Wheat. 1,) which do certainly support the doctrine that charitable uses might be enforced in Chancery upon the general jurisdiction of the court, independently of the statute of 43 of Elizabeth; and that the jurisdiction had been acted upon not only subsequent but antecedent to that statute. Such was the opinion of Sir JOSEPH JEKYLL in *Eyre v. Countess of Shaftsbury*, (2 P. Wms. 102, 2 Eq. Abr. 710, pl. 2,) and that of Lord NORTHINGTON in *Attorney-General v. Tancred*, 1 Eden, 10, (S. C. Amb., 351, 1 W. Bl. 90,) and that of Lord Chief Justice WILMOT in his elaborate judgment in *Attorney-General v. Lady Downing*, Wilmot's Notes, p. 1, 26, given after an examination of all the leading authorities. Lord ELDON, in the *Attorney-General v. The Skinner's Company*, 2 Russ. 407, intimates in clear terms his doubts whether the jurisdiction of Chancery over charities arose solely under the statute of Elizabeth; suggesting that the statute has perhaps been construed with reference to a supposed antecedent jurisdiction of the court, by which void devises to charitable purposes were sustained. Sir JOHN LEACH, in the case of a charitable use before the statute of Elizabeth, (*Attorney-General v. The Master of Brentwood School*, 1 Myl. & K. 376,) said: "Although at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust for the charity, which a court of equity would then execute." In point of fact the charity was so decreed in that very case, in the 12th year of Elizabeth. But what is still more important is the declaration of Lord REDESDALE, a great judge in equity, in the *Attorney-General v. The Mayor of Dublin*, 1 Bligh, 312, 347, (1827,) where he says: "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law. It created a

new and ancillary jurisdiction, a jurisdiction created by commission, &c.; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute; and there can be no doubt that by information by the attorney-general the same thing might be done." He then adds, "the right which the attorney-general has to file an information, is a right of prerogative. The king, as *parens patriæ*, has a right, by his proper officer, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases." So that Lord REDESDALE maintains the jurisdiction in the broadest terms, as founded in the inherent jurisdiction of Chancery independently of the statute of 43 Elizabeth. In addition to these dicta and doctrines, there is the very recent case of the *Incorporated Society v. Richards*, 1 Dru. & W. 258, where Lord Chancellor SUGDEN, in a very masterly judgment, upon a full survey of all the authorities, and where the point was directly before him, held the same doctrine as Lord REDESDALE, and expressly decided that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that, which at law was an illegal or informal gift; and that cases of charity in courts of equity in England were valid independently of and previous to the statute of Elizabeth.

Mr. Justice BALDWIN, in the case of the will of Sarah Zane, which was cited at the bar and pronounced at April term of the Circuit Court, in 1833, after very extensive and learned researches into the ancient English authorities and statutes, arrived at the same conclusion in which the district judge, the late lamented Judge HOPKINSON, concurred; and that opinion has a more pointed bearing upon the present case, since it included a full review of the Pennsylvania laws and doctrines on the subject of charities.

But very strong additional light has been thrown upon this subject by the recent publications of the Commissioners on the public Records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of

Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir JOSEPH JEKYLL, Lord NORTHINGTON, Lord Chief Justice WILMOT, Lord REDESDALE, and Lord Chancellor SUGDEN. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the *Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, was before this court, (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the legislature to supply the defects. It is no proof of the non-existence of equitable rights, that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and enforced in the State courts of Pennsylvania, as far as their remedial process would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman v. Lex*, 17 Serg. & R. 88, and that of Sarah Zane's will, before Mr. Justice BALDWIN and Judge HOPKINSON. In the former case, the court said "that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided

there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid; and were enforced accordingly. The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.

This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the Christian religion, and so is void, as being against the common law and public policy of Pennsylvania; and this for two reasons: First, because of the exclusion of all ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college, or even visiting the same: and secondly, because it limits the instruction to be given to the scholars to pure morality, and general benevolence, and a love of truth, sobriety, and industry, thereby excluding, by implication, all instruction in the Christian religion.

In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator, (of which indeed we can know nothing,) nor to consider whether the scheme of education by him prescribed, is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ; above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended

with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. We disclaim any right to enter upon such examinations, beyond what the State constitutions, and laws, and decisions necessarily bring before us.

It is also said and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790, (and the like provision will, in substance, be found in the constitution of 1776, and in the existing constitution of 1838,) expressly declares, "That all men have a natural and indefeasable right to worship Almighty God according to the dictates of their own consciences ; no man can of right be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent ; no human authority can, in any case whatever, control or interfere with the rights of conscience ; and no preference shall ever be given by law to any religious establishment or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used ; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff v. The Commonwealth*, 11 Serg. & R. 394.

It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college, for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country ; and therefore it must be made out by clear and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating not only that Christianity is not to be taught ; but that it is to be impugned or repudiated.

Now, in the present case, there is no pretence to say that any such

positive or express provisions exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked: why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making this restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instructions. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity as well as ecclesiastics? There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always

be, men, not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings, which such men by their conduct, as well as their instructions, may, nay must impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay-teachers? Certainly there is nothing in the will, that proscribes such studies. Above all, the testator positively enjoins, “that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that on their entrance into active life, they may from inclination and habit evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.” Now, it may well be asked, what is there in all this, which is positively enjoined, inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? The testator has not said how these great principles are to be taught, or by whom, except it be by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive. The objection, then, in this view, goes to this,—either that the testator has totally omitted to provide for religious instruction in his scheme of education (which, from what has been already said, is an inadmissible interpretation), or that it includes but partial and imperfect instruction in those truths. In either view can it be truly said that it contravenes the known law of Pennsylvania upon the subject of charities, or is not allowable under the article of the bill of rights already cited? Is an

omission to provide for instruction in Christianity in any scheme of school or college education a fatal defect, which avoids it according to the law of Pennsylvania? If the instruction provided for is incomplete and imperfect, is it equally fatal? These questions are propounded, because we are not aware that anything exists in the constitution or laws of Pennsylvania, or the judicial decisions of its tribunals, which would justify us in pronouncing that such defects would be so fatal. Let us take the case of a charitable donation to teach poor orphans reading, writing, arithmetic, geography, and navigation, and excluding all other studies and instruction; would the donation be void, as a charity in Pennsylvania, as being deemed derogatory to Christianity? Hitherto it has been supposed, that a charity for the instruction of the poor might be good and valid in England even if it did not go beyond the establishment of a grammar school. And in America, it has been thought, in the absence of any express legal prohibitions, that the donor might select the studies, as well as the classes of persons, who were to receive his bounty without being compellable to make religious instruction a necessary part of those studies. It has hitherto been thought sufficient, if he does not require anything to be taught inconsistent with Christianity.

Looking to the objection therefore in a mere judicial view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania.

This view of the whole matter renders it unnecessary for us to examine the other and remaining question, to whom, if the devise were void, the property would belong, whether it would fall into the residue of the estate devised to the city, or become a resulting trust for the heirs at law.

Upon the whole, it is the unanimous opinion of the court, that the decree of the Circuit Court of Pennsylvania dismissing the bill, ought to be affirmed, and it is accordingly affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the eastern district of Penn-

sylvania, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause be, and the same is hereby affirmed with costs.

The subject of the validity of devises and dedications of property to charitable uses and the capacity of corporations organized for charitable purposes to take and hold property for such objects, together with the restrictions placed by the law upon the dedication of property to such uses by will or otherwise, is one of considerable interest. The policy of the law in this country, while based primarily on that of England, is, generally speaking, more liberal than that which has prevailed in the mother country, and, under our law, charities are said to be especial favorites, the law agreeing in that respect with the civil law, wherein it is laid down as follows: "Since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious use and that of their utility for the public good, they are considered as being privileged in the intention of the law," Domat, § 3591, Strahan's translation. As striking results of this favor we shall see, as we progress, that devises or dedications to charity may be made *in perpetuam*, with a restraint upon the power of alienation, and that devises, which, were they to or for a private use, would be considered as too indefinite to be enforced, will be saved and sustained by the fact that they are to charitable uses.

We propose to consider :—

1. What is a charity ?
2. The manner in which the courts have dealt with charitable devises and dedications.
3. The restrictive legislation bearing upon wills and gifts to charitable purposes and upon the capacity of charitable bodies to take and hold land or other property.

Definition of Charity.

1. First, then, what is charity in the purview of the law? The most famous definition is that of Mr. Binney, which is quoted in almost every case which has arisen upon charities since *Vidal v. Girard's Executors*: "Whatever is given for the love of God or for the love of our neighbor, in the catholic and universal sense—given from these motives and to these

ends, free from the stain of everything that is personal, private, or selfish—is a gift for charitable uses." Lord CAMDEN had previously given a definition of praiseworthy brevity and point, viz: "A gift to a general use, which extends to the poor as well as the rich," *Jones v. Williams*, Ambl. 651; and of late years the definition given by Mr. Justice GRAY, in *Jackson v. Phillips*, 14 Allen, 539, has been much commended. It is more descriptive than that of Mr. Binney; and, as it does not rest upon the motive of the creator of the charity to the same extent as does the better-known definition, it seems to more closely define a legal as distinguished from a natural charity. It is as follows: "A gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves, in life or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its motive."

Charity must be for a General Benefit—What generality sufficient.

The first characteristic of a charity is that it is for the general benefit, and not for the use of a particular individual or particular individuals, *Wright v. Linn*, 9 Pa. St. 433; and, therefore, where there is a devise to a purpose which would ordinarily be considered charitable, and the recipient of it is pointed out as an individual, there is no charitable devise; as where there is a devise for education for the ministry, and the person to receive the education is pointed out by the will, not as one of a class but as an individual known to the testator, *McMillen's Appeal*, 11 W. N. C. 440, reversing *McPherson's Estate*, Id. 54; and a devise in trust to apply the proceeds "for the aid and support of those of my children and their descendants who may be destitute and in the opinion of said trustees need such aid" cannot be upheld as a public charity, *Kent v. Dunham*, 142 Mass. 216. But while the purpose must be general—and even the public at large is said in some cases to be a proper recipient of a charity, see *Antones v. Heirs of Eslava*, 9 Port. 527, and a dedication to public use, where the purpose is definite, may be sustained without the naming of any grantee, *Cincinnati v. Lessee of White*, 6 Pet. 431—yet the benefits of the devise or dedication may be well limited to a certain class, the requirement of generality being satisfied by a comprehension of particular classes of persons or designated communities: as a

devise for the use of the poor of a certain society, *Zimmerman v. Anders*, 6 W. & S. 218; *Witman v. Lex*, 17 S. & R. 88; of the poor of a certain district, *Williams v. Pearson*, 38 Ala. 299, or county, *State v. Gerard*, 2 Ired. Eq. 210; *Craig v. Secrist*, 54 Ind. 419; *Urmey's Ex'r v. Wooden*, 1 Oh. St. 160; of the suffering poor of a certain place, *Howard v. American Peace Society*, 49 Me. 288; of such poor white citizens of a certain county who, by timely assistance, may be kept from the poor-house, *Griffith v. State*, 2 Del. Ch. 421, affirming *State v. Griffith*, Id. 392; of poor emigrants coming to a certain city, on their way, *bona fide*, to settle in the West, *Chambers v. St. Louis*, 29 Mo. 543; a devise to be applied to the education of students of a certain religious faith, *Witman v. Lex*, 17 S. & R. 88; and see *Price v. Maxwell*, 28 Pa. St. 23; and the fact that a preference is given to what may be called a sub-class of the same general class will not vitiate a charitable devise; thus a devise for the benefit of the poor giving a preference to the poor of a certain church or parish is good as a charity, *Trustees v. Wilkinson*, 36 N. J. Eq. 141.

The fact that, to a certain extent, private or family reasons enter into the motive for gift, will not destroy the charitable character of a devise or dedication, while the persons to receive the charity are left indefinite, Mr. Binney's requirement that the gift must be free from the stain of everything that is private or selfish, not being upheld by the decided cases; thus the fact that by the terms of the gift, a preference is to be given, as to its enjoyment, to descendants of the donor, will not prevent the gift from being a charity, *Martin v. McCord*, 5 Watts, 493; and in *Franklin v. Armfield*, 2 Snead, 305, a devise which provided for a school, to educate, in the first place, the descendants of the testator, and, if the revenues proved sufficient, then the poor, was held a charity; MARSHALL, Sp. J., saying: "It is said that a motive of the testator personal to the beneficiaries would vitiate a donation to a charitable use. This must be taken with much allowance. It is certainly untrue as to the motives personal to classes, as shown by the cases of *Murdock v. McDonough*, and *Vidal v. Girard*. If a devise by a testator for the education of the children, or the orphans, or poor born in his native city, should be good as a charity, we cannot see why a devise for the education of the children born of certain designated ancestors should not be good as a charity. Viewed philosophically, the uncertainty is the same." But where the benefit is to be confined entirely to descendants of the testator, who makes no provision for extending it, in any event, beyond his line, there is no charity, *Kent v. Dunham*, 142 Mass. 216. The distinction is readily recognizable between such a devise and one to the poor with a preference to the descendants of the testator; in the latter case the descendants take as part of the poor, having, it is true,

a preference; in the former they take as descendants, the poor amongst them being preferred.

The fact that a testator or donor provides for the association of his name with the institution or charity to be founded, as the result of his gift, will not take away the charitable character of the gift; thus in *Miller v. Porter*, 53 Pa. St. 292, the testator provided by his will for the erection of a college to be called after him, Porter University or College—it was argued that the bequest was "for the personal, but worthy pride and ambition of the testator to perpetuate his name and memory. No part of this gift was for gratuitous education, for the salary of teachers or for the poor," but the court held the devise a charity WOODWARD, C. J., in delivering the opinion of the court saying, after quoting Mr. Binney's definition, "If so exalted motives as these prompted Mr. Porter to found a university, an ambition (not unworthy of himself), dictated that it should bear his name down to posterity, and ambition is a selfish passion, which according to the definition would take away the charity of the deed. If an act of charity must indeed be free from *any* taint of selfishness, very much that passes under the name is spurious, whilst the genuine article is so extraordinary a virtue that we ought not to wonder that an inspired apostle ranked it above the Christian virtues of Faith and Hope. But though the founding of a school of learning to perpetuate one's name, may not come up to the abstract idea of a Christian charity, one question is, whether courts of justice, and especially this court, have not always treated it as a charity," and see *Jones v. Habershaw*, 3 Woods, 443.

But the infusion of a little charity into a bequest, not in the main charitable, will not entitle the bequest to the privileges of a charity, *Coit v. Comstock*, 51 Conn. 353; and where a provision is made for pecuniary profit, to be derived, even upon a contingency, by the legatees, the bequest is not a charity, as in *State v. Elliston*, 4 Baxt. 99, where there was a devise to a company for the purpose of establishing a girl's school, "the profits after expending what is proper for the cause, to be divided amongst the company."

Superstitious Use.

Under the English law, a gift to a superstitious use—which in England might have been defined as a religious use not in accordance with, or under the control of, the established church—could not be sustained as a charity, but in this country it is very questionable whether such a thing as a superstitious use could be found, as said by GIBSON, C. J., "it is not easy to see how there can be such a thing here, at least in the acceptation of the word

by the British courts, who seem to have extended it to all uses which are not subordinate to the interests and will of the established church," *Methodist Church v. Remington*, 1 Watts, 219, and in *Gass & Bonta v. Wilhite*, 2 Dana, 170, NICHOLAS, J., said: "It is neither for the legislature nor the judiciary, in this State, to discriminate and say what is a pious and what a superstitious use. To do so, would necessarily infringe upon the great constitutional guarantee of perfect freedom and equality in all religions;" and see *Attorney-General v. Jolly*, 1 Rich. Eq. 99. A gift for the saying of masses, against which, as much as anything, the English doctrine was enforced, has been expressly decided not to be a gift for a superstitious use, *Re Hagenmyer's Will*, 12 Abb. N. C. 432, has been enforced at the suit of the priest of the church to whom, *descriptio officii sui*, the bequest for the saying of the masses was made, *Appeal of Seibert and Bradley*, 18 W. N. C. 276, and has been expressly held a charity, *Re petition of James Schouler*, 134 Mass. 427.

Classes of Charities—Statute 43 Elizabeth.

Charities are of two classes ; those which the common sense of mankind recognizes as such, and those which have been declared so to be by law. Of the first class, those charities whose objects are to feed the hungry, clothe the naked, minister to the sick, at once present themselves as examples. With regard to those of the second class—the first attempt to enumerate them appears to have been in the statute of 43 Elizabeth, the nature and effect of which we shall consider further on, when we come to consider the interpretation and enforcement of charitable devises ; it set forth in its list of charities, the relief of aged, impotent and poor persons, the maintenance of houses of correction, the marriage of poor maids, the supportation, aid and help of young tradesmen, handcraftsmen and persons decayed, the redemption and relief of prisoners and captives, aid or ease of any poor inhabitants concerning payments of fifteenth, setting out of soldiers and other taxes. The foregoing list, probably, at the time the statute was passed, embraced practically all the recognized charities known to the draughtsmen of the Act, but it is not to be considered as imposing a limitation on the subjects of charity, nor has it been so considered by the course of judicial decision in this country, even in those States where the Statute of Elizabeth, or its principles have been held to be in force. Accordingly, amongst other things we find the following subjects upheld as charities: A gift for the maintenance of a priest for a church, *McGirr v. Aaron*, 1 P. & W. 49 ; for the support of a minister, *Andrews v. Andrews*, 110 Ill. 223 ; the support of a meeting-house for public

worship, *McKissick v. Pickle*, 16 Pa. St. 140, and it was so held in that case, although the deed, making the gift, expressed it to be for the use of the parties to the same—but in the case of the *Old South Church v. Crocker*, 119 Mass. 1, the court said that, “gifts for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity if there is no definite body, for whose use the gift was intended, capable of receiving, holding, and using it in the manner intended. To give it the character of a public charity, there must appear to be some benefit to be conferred upon or duty to be performed towards either the public at large or some part thereof, or an indefinite class of persons, *Going v. Emery*, 16 Pick. 107, 119; *Perry on Trusts*, § 710; *Saltonstall v. Sanders*, 11 Allen, 446. But when there is a body, or a definite number of persons ascertained, or ascertainable, clearly pointed out by the terms of the gift to receive, control, and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone, *Attorney-General v. Federal St. Meeting House*, in 3 Gray, 1, 49; *Parker v. May*, 5 Cush. 336,” and the court held a devise to a certain ecclesiastical body to be erected to be not a charity, WELLS, J., saying: “Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy in accordance with the usual practice of all Christians in this Commonwealth, does not thereby become a public charity;” but, on the other hand, a devise in remainder to such Methodist Church as the particular tenant might be a member of at the time of her death, has been upheld as a charity, *Atty.-General v. Jolly*, 1 Rich. Eq. 99; and a direct devise to a religious corporation has been sustained where the charter of the corporation shows it to be a charitable one, *Quinn v. Shields*, 62 Iowa, 129; this case may possibly be distinguished from that of the Old South Society, *supra*, by the fact that the devise was to an order of Sisters of Charity—the Sisters of the Humility of Mary—whose object was charitable, while in the Massachusetts case the gift was to defined associates and their successors for ever “for the erecting of a house for their assembling themselves together publicly to worship,” the object being confined to the maintenance of a public worship by certain persons and no ulterior object, either for the enlightenment of the souls of mankind at large or the amelioration of their bodily condition, being apparent.

In some cases it is held that a careful restriction to religious uses will not alone give to a devise the character of a charity, *Wells v. Heath*, 10 Gray, 17; *Attorney-General v. The Proprietors of the Meeting House in Federal Street*, 3 Id. 1-65; *Atty.-Gen. v. Trinity Church*, 9 Allen, 422, and we have already seen that a religious use may be so limited in its effect

as not to be a charity, *Old South Church v. Crocker*, *supra*; but, generally speaking, a religious use is held to be a charitable one; in *Atty.-Gen. v. Jolly*, HARPER, Ch., said: "There can be no doubt that a trust for the support of religion is a charitable use," and see *Jones v. Habersham*, 3 Woods, 443; S. C., 107 U. S. 174. A devise for religious or missionary purposes generally will be good as a charity; as a bequest "to the cause of Christ," *Going v. Emery*, 16 Pick. 107; a bequest "to aid in propagating the holy religion of Jesus Christ," *Hinckley v. Thatcher*, 139 Mass. 477; for the advancement of the Christian religion, *Miller v. Teachout*, 24 Oh. St. 525, and that although it may be coupled with an intent for the promotion of the religious interests or tenets of the particular ecclesiastical body to which the devise is directly made, *DeCamp v. Dobbins*, 29 N. J. Eq. 36, as in the case of a devise to the first Christian Church to be erected in a certain place, *Jones v. Habersham*, 107 U. S. 174, or for the preaching of the gospel as taught by the people known now as the Disciples of Christ, *Somers v. Cyrenius*, 39 Oh. St. 29, or for the building of a convent, *Hughes v. Daly*, 49 Conn. 34.

Gifts for educational purposes are, when not of a private character, charities, *DeCamp v. Dobbins*, 29 N. J. Eq. 36; *Dodge v. Williams*, 46 Wisc. 70; *Pickering v. Shotwell*, 10 Pa. St. 23; *Russell v. Allen*, 107 U. S. 163, affirming S. C., 5 Dillon, 235; *Birchard v. Scott*, 39 Conn. 63; *Andrews v. Andrews*, 110 Ill. 223; as a gift or devise for a public school, *Boxford Religious Society v. Harriman*, 125 Mass. 321; for a school-house, *Morrison v. Beirer*, 2 W. & S. 81; to establish a college, *Taylor's Executors v. Trustees of Bryn Mawr*, 34 N. J. Eq. 101; to establish an agricultural college, *Cresson's Appeal*, 30 Pa. St. 437; and this not only where the devise provides especially for the education of the poor, as in *Clement v. Hyde*, 50 Vt. 716; *Williams v. Williams*, 8 N. Y. 524; *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; *Griffin v. Graham*, 1 Hawks, 96; *State v. McGowen*, 2 Ired. Eq. 210; *Zanesville Canal and Manufacturing Co. v. Zanesville*, 20 Oh. 483; *Mason v. Trustees*, 12 C. E. Green, 47; *Newson v. Starke*, 46 Ga. 58; but where the benefits of the gift are not restricted to the poor, *Franklin v. Armfield*, 2 Sneed, 305; and even where it does not appear that the testator or grantor contemplated the bestowal of free education, *Price v. Maxwell*, 28 Pa. St. 23; *Taylor's Exr's v. Trustees of Bryn Mawr College*, 34 N. J. Eq. 101; and so where the educational privileges are restricted to persons of a certain religion, *Dickson v. Montgomery*, 1 Swan, 348; or race, *Lindley's Case*, 32 Ind. 367; *Grimes v. Harmon*, 35 Id. 198; *Soohan v. Philadelphia*, 33 Pa. St. 9; *Kinnaird v. Miller*, 25 Grat. 107; or to persons of a certain previous condition, *e. g.*, freedmen, *McAllister v. McAllister*,

46 Vt. 272; or who have certain presumable views as to their future occupation, *e. g.*, apprentices, *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; *Dickson v. Montgomery*, 1 Swan, 348; or who reside in a certain locality, *Wright v. Linn*, 9 Pa. St. 433; *Martin v. McCord*, 5 Watts, 493; *Stevens v. Shippen*, 28 N. J. Eq. 487; or who are to be educated in a certain academy, *Williams v. Williams*, 8 N. Y. 525; and so where, without there being a restriction, preference is given to the testator's descendants, *Franklin v. Armfield*, 2 Snead, 305; or to persons born in a certain locality, *Soohan v. Philadelphia*, 33 Pa. St. 9; *Philadelphia v. Girard*, 45 Id. 9; *Vidal v. Girard*, 2 How. 128; but, on the other hand, there are cases which hold that, to render an educational institution a charity, there must be, at least, an infusion of what in the popular sense is known as a charity; thus in *Attorney-General v. Soule*, 28 Mich. 158, there was a devise "for the establishment of a school at Montrose, aforesaid, for the education of children, to be expended according to the direction of my executors." This the court, in a suit to enforce the provisions of the will, held not to be such a devise as the State would be justified in interposing to enforce as charity; GRAVES, J., saying: "I see nothing in the words of the testator to preclude a school, which, according to the authorities, could not be recognized as a charity at all;" and, as we have already seen, a devise to or for a school, which may yield a pecuniary profit to its owners, is not a devise to a charity, *State v. Elliston*, 4 Baxt. 99.

A gift to a public library, or to one whose use is not limited to donors and subscribers, is a gift to a charity, *Drury v. Natick*, 10 Allen, 169; *Brown v. Pancoast*, 34 N. J. Eq. 321; and a library may be a charity, although it be owned by a body of stockholders who have certain privileges beyond those accorded to the general public. This was held in the well-known case of the Library Company of Philadelphia, whose regulations permitted the use of the library: 1. By *all persons* within the library building, free of charge or fee of any kind; 2. By *all persons* who desired to take out books, and for that privilege paid a small hire and left a deposit as security for the return of the books; 3. By members or commuters who paid an annual sum instead of a separate hire for each time of taking out a book. The library company was a corporation which issued shares which were transferable, devisable and inheritable, and was governed by a board of directors elected annually by the shareholders. It was not, however, administered for gain; and all its moneys and receipts were devoted to the maintenance and improvement of the library. The Constitution of Pennsylvania provides that the General Assembly may, by general law, exempt from taxation "insti-

tutions of purely public charity," Const. Art. 9, § 1. By virtue of the authority conferred in this article the Legislature passed an Act exempting from taxation, *inter alia*, "institutions of learning, benevolence, or charity . . . founded, endowed, and maintained by public or private charity." Under this description the library company claimed exemption from taxation, and its right to such exemption was sustained by the Court of Common Pleas, No. 2, of Philadelphia, and by the Supreme Court, *Donohugh's Appeal*, 86 Pa. St. 306; S. C., 5 W. N. C. 196. MITCHELL, J., in delivering the opinion of the Common Pleas, which was adopted by the Supreme Court, very fully considered the question, and in the course of the opinion said: "That the complainant is a charity in the legal sense of the word does not admit of question. It is equally clear that it is a charity in the somewhat narrower and more popular sense in which we must interpret the words of a popular instrument like the Constitution. . . . But is the complainant a *public* charity? . . . The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this *indefinite* or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway of the Commonwealth, and none the less because a vast majority of the citizens will certainly never derive any benefit from its use. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms or by the restrictive force of the description of the persons for whose benefit they are intended. . . . Tried by this standard it would seem clear that the Philadelphia Library is public, so far at least as regards the use of the books within the building; that is free to all alike without charge. Is its public character destroyed by any special privileges to members or other individuals? We cannot see that it is. Some system of government, some regulations of administration, are necessary in all large bodies; provided they be reasonable and not repugnant to the general purpose, they are valid and do not affect the character of the institution. The general privilege of reading the books within the building, and under the supervision of the librarian, being conceded freely to all, the further privilege is sought of taking books away to be read at home, and this we find is also conceded to all persons alike, on the condition that a deposit shall be made of the value of the book to insure its return, and a sum paid for its hire or loan. A step further brings us to the third and last privilege, that of members, who, instead of paying the hire of each book from time to time, as they take it out, pay a single annual sum as an equivalent. The principle of commutation is familiar. It is as

old as the history of tithings in England, as universal as the convenience and necessities of business everywhere. . . . One other privilege of the members, besides this commutation of book hire, may be included in the same class of administrative details—the privilege of voting for the managers who conduct the affairs of the library. The managers are trustees and some mode must be provided for their appointment. The particular mode selected is a matter for the founders or the State in granting a charter; but having been adopted, it does not in any way affect the public character of the corporation.” The learned Judge then considered the effect of the word “purely” in the constitutional phrase “purely public charity,” which phrase he held was “intended to exclude those charities which are private or only quasi-public, such as many religious aid societies and those which, though public to some extent or for some purposes, have, like Masonic lodges and similar charities, some mixture of private with their public character,” and summed up as follows: “The library is a trust, and while it is the property of the corporation and therefore in a certain sense of the corporate stockholders, yet it is not their property in any full legal or commercial sense. They cannot sell it and divide the proceeds among themselves as individuals—that would be a violation of the trust, which a court of equity would be bound at once to restrain. Being then a trust, its purpose and scope must be looked for in the grant. It is not a question of how the revenue is derived, but to what purpose and with what intent it is devoted. The purpose of this trust is clearly set forth in the charter; it is ‘to erect a library for the advancement of knowledge and literature in the city of Philadelphia,’ and we fail to discover in it any taint of private profit. I have already discussed the members’ privilege of commutation by annual payment for the hire of books, and it is said in the charter that this payment shall be ‘for the increase and preservation of said library.’ I have endeavored to show that this privilege, almost the only one in which any distinction is made between the members and the general public, is not an undue privilege or justly obnoxious to the charge of being a private profit. But even this privilege is a regulation, not a fundamental law of the corporation; and if it were held to be an undue privilege, repugnant to the public character of the charity, the result would be not that the charity would become less purely public but that the privilege would be void.”

A gift to promote the public good by the encouragement of learning, science and the useful arts, without any special reference to the poor, is a charity, *American Academy of Arts and Sciences v. Harvard College*, 12 Gray, 582; so a gift to establish a professorship of the fine arts in a university, *Cresson's Appeal*, 30 Pa. St. 437.

A gift for a Sunday-school is a charity, *Mason's Executors v. Trustees of the Methodist Episcopal Church*, 27 N. J. Eq. 47; but a gift, the income arising from which is to be used in making Christmas presents to the scholars of a Sunday-school, is not, *Goodell v. Union Association*, 29 N. J. Eq. 32; devises for the distribution of Bibles and good books are charities, *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. American Bible Society*, 2 Allen, 334; *Pickering v. Shotwell*, 10 Pa. St. 23.

Devises for public works or conveniences may be charities; as a devise for the erection of a town-house for transacting town business, the court saying: "The object of the legacy was a general public use, as convenient for the poor as the rich," *Coggeshall v. Pelton*, 7 Johns. Ch. 292; a devise to be laid out in repairing highways and bridges, *Town of Hamden v. Rice*, 24 Conn. 357; for providing shade-trees, *Cresson's Appeal*, 30 Pa. St. 437; for a fire-engine and hose or to a fire company, *Magill v. Brown*, Bright. 348; *Humane Fire Co.'s Appeal*, 88 Pa. St. 389; *Bethlehem Borough v. Perseverance Fire Co.*, 81 Id. 445. Devises to certain associations in their nature charitable are charities; as to a Masonic lodge, *Cruse v. Axtell*, 50 Ind. 49; and see *King v. Parker*, 9 Cush. 71, although, as remarked by WELLS, J., in *Old South Society v. Crocker*, 119 Mass. 1, the question did not directly arise in that case; to a Young Men's Christian Association, *Goodell v. Union Association*, 29 N. J. Eq. 32; to missionary societies, *Bartlet v. King*, 12 Mass. 537; *Burr v. Smith*, 7 Vt. 241; *Maine Baptist Missionary Convocation v. City of Portland*, 65 Me. 92; to an order of Sisters of Charity, *Quinn v. Shields*, 62 Iowa, 129; but a devise to a beneficial society whose benevolences or charities are confined to its own members does not come within the rule, *Babb v. Reed*, 5 Rawle, 151 (a case of a lodge of Odd Fellows); *Blelon's Estate*, Bright. 338; *Swift's Executor v. Easton Beneficial Society*, 73 Pa. St. 362; and see *Estate of Tobin, Myrick*, 134; and it may here be noted that a gift to a purpose of benevolence is not a gift to a charity within the purview of the law, for "benevolence is wider than charity in its legal signification," *Thomson's Executor v. Norris*, 20 N. J. Eq. 489; but the word benevolence used in a will may be so explained as to mean charity, as will appear further on, when we come to consider the subject of the interpretation of instruments creating charitable uses.

Gifts to corporations or institutions organized or established for charitable purposes are charities; as a gift to a hospital for the indigent blind and lame, *Philadelphia v. Elliott*, 3 Rawle, 170; or of lands upon which to build a hospital, *Ould v. Washington Hospital*, 95 U. S. 303; to an orphan asylum, *Gould v. Taylor's Hospital*, 46 Wisc. 106; *Milne v. Milne*, 17 La. 46; and a hospital which has no stock, and does not devote its

funds to the profit of its corporators, is a charity, although it receive pay from the patients, and although the question of the admission of patients is determined by officers of the hospital and there is no right in any one to demand admission, *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; and so also is a corporation for the support of poor and infirm women, which devotes all its funds to that purpose and makes no profit, although it require a sum of money to be paid in order to obtain admission to the home maintained by it, *Gooch v. Association for Relief of Aged Females*, 109 Mass. 558.

Whether a devise for keeping in order a burial lot or cemetery would be sustained as a charity is a question of some doubt. It was held in *Joce-lyn v. Nott*, 44 Conn. 55, that it would not; but in *Jones v. Habersham*, 3 Woods, 443, BRADLEY, J., after alluding to the fact that under the Georgia Code, § 3157, the matter was declared a charity, said: "It is somewhat singular that it should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity and received the peculiar care of the Roman law."

A bequest for the suppression of the manufacture, sale and use of intoxicating liquors has been held a charity, *Haines v. Allen*, 78 Ind. 100: and so has one "to create a public sentiment that will put an end to negro slavery and for the benefit of fugitive slaves," *Jackson v. Phillips*, 14 Allen, 539; but it is worthy of note that in the same case the court held bad a devise to secure the passage of laws granting women "the right to vote, hold office, manage and devise property, and all other civil rights enjoyed by men," not, however, on the ground that it would be a mistaken kindness to extend to women masculine rights and subject them to masculine responsibilities, but on ground of public policy which we shall consider further on. A devise for "the cause of peace" has been held a charity, *Tappan v. Deblois*, 45 Me. 123.

A devise to or for the benefit of the poor generally of a certain locality, is a charity, *Lowring v. Marsh*, 2 Cliff. 469; *Williams v. Pearson*, 38 Ala. 299; *Commissioners v. Rogers*, 55 Ind. 297; *Deering v. Adams*, 37 Me. 264; *Craig v. Secrist*, 54 Ind. 419; *State v. Gerard*, 2 Ired. Eq. 210; *Urmey's Executor v. Wooden*, 1 Oh. St. 160; *Shotwell v. Mott*, 2 Sand. Ch. 46 (but the authority of this case in its own State is doubtful), *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Id. 115; *Hornberger v. Hornberger*, 12 Heisk. 635, and so a devise to such poor "as by timely assistance could be kept from the poor-house," *Griffith v. State*, 2 Del. Ch. 421; S. C., Id. 392; to the "suffering poor" of a certain town, *Howard v. American Peace Society*, 49 Me. 288, and the bequest may be limited to the poor of a certain

class—as scholars, *Griffin v. Graham*, 1 Hawks, 96; poor white housekeepers, *Philadelphia v. Fox*, 64 Pa. St. 169; poor children of a certain county, *Franklin v. Armfield*, 2 Snead. 305; poor families, widows, new-comers in distress or persons in a designated county suffering for want of food, fuel, and clothing, especially in the winter, not to be paid to drunkards but to their suffering families, if worthy, *Erskine v. Whitehead*, 84 Ind. 357; of a certain creed—as for the relief of the Jewish poor, *Mayer v. Society*, 2 Brewst. 385; of a certain church or society, *Attorney-General v. Old South Society*, 13 Allen, 474; *McLoughlin v. McLoughlin*, 30 Barb. 458; *Yard's Appeal*, 64 Pa. St. 95; *Witman v. Lex*, 17 S. & R. 88; *Magill v. Brown*, Bright. 346; *Trustees v. Wilkinson*, 36 N. J. Eq. 141; and the bequest may be limited to those of the poor who satisfy certain moral requirements, as to the well behaved, the honest, the pious, the prudent, or even the worthiest or most deserving, where a power of judgment is lodged somewhere, see *Grandom's Estate*, 6 W. & S. 537; *Philadelphia v. Fox*, 64 Pa. St. 169; *Richmond Co. v. Tayloe*, Gilm. 336; *McCord v. Ochiltree*, 8 Blackf. 15; *Hesketh v. Murphy*, 35 N. J. Eq. 23; S. C. on appeal, 36 Id. 304; *De Bruler v. Ferguson*, 54 Ind. 549.

Favor Shown to Charitable Devises or Gifts—Origin of Peculiar Law of Charities.

It is one of the characteristics of a charity that in dealing with it a court will often enforce a trust for, or a devise to, a charity, although it be couched in such terms that were it for a private use it could not be sustained. This is the case in most of the United States as well as in England; there is, however, some difference in the degrees of liberality manifested by the courts of the various States in sustaining or interpreting charitable devises or dedications, which difference arises out of the different views taken by the judicial tribunals of the power, and of the origin of the power, of the courts over the subject, some deriving the authority of courts in the matter of the enforcement of charitable bequests and dedication exclusively from the Stat. 43 Eliz. and others from the far wider power inherent in chancery, apart from the royal prerogative exercised through the chancellor as the *custos conscientiae regis*, and some even going so far as to maintain that the parental power of the British crown is vested in the state, although it is believed that while there are dicta to this last effect, yet no court has ever carried this doctrine to its legitimate conclusion. It may be somewhat interesting to consider the course of decision of the various courts upon this subject.

The Statute of 43 Eliz., Ch. 4, recites that whereas lands, hereditaments, goods, and money have been given by many well-disposed persons for certain purposes (see *ante* v. 336¹) which donations have not been em-

ployed according to the will of the founders by reason of breaches of trust and omissions, it is enacted that the chancellor (and the chancellor of the duchy of Lancaster within his jurisdiction) may from time to time award commissions, under the great seal, to the bishop of every diocese (and to the chancellor, if there be no bishop at the time) and to other persons of good and sound behavior, authorizing them, or any four of them, to inquire—as well by the oaths of twelve lawful men, or more, of the county, and by all other good and lawful means—of all such gifts and appointments, and of abuses, breaches of trust, misemployment, concealing or misgovernment of lands, hereditaments, goods and money appointed for any of the charitable and godly uses before mentioned; and the commissioners, after inquiry, shall make orders, judgments and decrees for faithfully employing such gifts to the charitable uses and interests for which they were appointed, with an appeal therefrom to the chancellor.

It seems strange that this Act, which on its face is purely administrative, should long have been regarded as the absolute foundation of the power of chancery to carry out the will of the devisor or grantor of a charitable use; but such, nevertheless, has been the case, and the results produced by this theory, in some of the United States, have been decidedly important. Of course, in England, where the power of the king over charities as *parens patriæ* is acknowledged and this extraordinary prerogative power is exercised in chancery, the question of the origin of the ordinary chancery jurisdiction over charities is of less importance and has, consequently, received less attention.

The question of the origin of the peculiar law of charities came before the Supreme Court of the United States in the year 1819, in *The Baptist Association v. Hart's Executors*, 4 Wheat. 1, a case arising in Virginia, in which State, in 1792, an Act had been passed repealing all English statutes, including 43 Eliz., Ch. 4. In 1795 one Hart, a citizen of Virginia, died, leaving a will by which he made a bequest to the Philadelphia Baptist Association, which was an unincorporated society; as no trustee was appointed, the law was clear that, as there was no person *in esse*, at the death of the testator, capable of taking, the bequest must fail unless there existed a power in the courts to sustain it as a charity. Upon this subject the court below was divided, and the case was removed to the Supreme Court upon a certificate of division of opinion. Mr. Wirt argued that the peculiar law of charities did not originate in the Statute of 43 Eliz.; that the statute did not profess to give any validity to any devises or legacies not before good, but only furnished a new method of enforcement; that where a good, definite charity had been erected before the statute the court would have enforced it; and that a resort to the royal pre-

rogative was necessary only when the objects of the trust were entirely indefinite, as in the case of a legacy generally to charity or the poor. The court, however, held that the jurisdiction rested on the statute. "If," said MARSHALL, C. J., "as has been contended, charitable trusts, however vague, could then [*i. e.* prior to the statute of 43 Eliz.] as now have been enforced in chancery, why pass an Act to enable the Chancellor to appoint commissioners to inquire concerning them, and to make orders for their due execution, which orders were to be revised, established, altered or set aside by him? If the Chancellor could accomplish this, and was in the practice of accomplishing it in virtue of the acknowledged powers and duties of his office, to what purpose pass the Act? Those who might suppose themselves interested in these donations, would be the persons to bring the case before the commissioners; and the same persons would have brought it before the Chancellor, had the law afforded them the means of doing so. The idea that the commissioners were substituted for the court as the means of obtaining intelligence not otherwise attainable, or of removing inconveniences in prosecuting claims by original bill which had been found so great as to obstruct the course of justice, is not warranted by the language of the Act, and is disproved by the efforts which were soon made, and which soon prevailed, to proceed by way of original. The statute recites that whereas lands, money, etc., had been heretofore given, etc., some for the relief of aged, impotent, and poor people, etc., which lands, etc., nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of what? of the difficulties of discovering that such trusts had been created? or of expensiveness and inconvenience of the existing remedy? No. 'By reason of frauds, breaches of trust and negligence in those that should pay, deliver and employ the same.' That is, by reason of fraud, breach of trust and negligence of the trustees. The statute then proceeds to give a remedy for these frauds, breaches of trust and negligences. Their existence was known when the Act passed and was the motive for passing it. No negligence or fraud is charged on the court, its officers, or the objects of the charity; only on the trustees. Had there been an existing remedy for their frauds and negligences, they could not, when known, have escaped that remedy. There seem to have been two motives, and they were adequate motives for enacting this statute; the first, and greatest, was to give a direct remedy to the party aggrieved who, where the trust was vague, had no certain and safe remedy for the injury sustained; who might have been completely defeated by any compromise between the heir of the feoffor and the trustee; and who had no means of compelling the heir to perform the trust, should he enter for condition broken. The second to

remove the doubts which existed whether these charitable donations were included within the previous prohibitory statutes." And STORY, J., in his concurring opinion, reported in 3 Peters, 486, said: "It seems to me that the jurisdiction of the Court of Chancery over charities where no trust is interposed or there is no person *in esse* capable of taking or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but sprang up after the statute of Elizabeth, and rests mainly on its provisions." This case, although fiercely attacked, see *Johnson v. Mayne*, 4 Iowa, 180; *Potter v. Chapin*, 6 Paige, 639; and, considered as an enunciation of general principle, now abandoned, is still law in Maryland, and for a long time the Supreme Court of the United States either adhered to or hesitated to overrule it. In *Inglis v. The Sailors' Snug Harbor*, 3 Peters, 99 (see *ante*, Vol. I. 412), the case is mentioned, and is distinguished from the one before the court. *Vidal v. Girard*, 2 How. 127, was distinguished on the ground that in Pennsylvania there had been no express repeal of the statute of Eliz. 43. TANEY, C. J., in *Meade v. Beale*, Taney's C. C. Dec. 339, says that the case of Vidal was decided altogether on Pennsylvania law, and the same assertion was made in *Wheeler v. Smith*, 9 How. 55, but, the tendency of decisions, all over the country, being to consider the Virginia rule as exceptional, and a more careful consideration having been given to the character of the statute, the court finally in *Ould v. Washington Hospital*, 5 Otto, 303, broke away from and abandoned the theory of *The Baptist Association v. Hart's Executors*, though in cases arising in Maryland, doubtless, as the principles of that case are now part of the law of property, it would be compelled to follow them, as it has done in cases arising in Virginia, so lately as 1879; see *Kain v. Gibboney*, 11 Otto, 362. In delivering the opinion in *Ould v. Washington Hospital*, SWAYNE, J., said: "The former idea was exploded and has since nearly disappeared from the jurisprudence of the court. Upon reading the statute carefully one cannot but feel surprised that the doubt thus indicated ever existed. The statute is purely remedial and ancillary. It provided for a commission to examine into the abuses of charity, and to correct such abuses. An appeal lay to the Lord Chancellor. The statute was silent as to the assertion or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity to touch the subject. The object of the statute was to create a cheaper and speedier remedy for existing abuses. *The Morpeth Corporation*, Duke on Char. Uses, 242. In the course of time the new remedy fell into entire disuse and the control of the Chancellor became again practically sole and exclusive. The power of the King, as *parens*

patriæ, acting through the Chancellor, and the power of the latter, independently of the King, are subjects which need not here be considered."

In Virginia, from the earliest case in which the question arose until very recently, the doctrine of charitable uses was uniformly denied to be law. The first authoritative declaration upon the subject was in the case of *Gallego's Executors v. The Attorney General*, 3 Leigh, 450, in which case TUCKER, P., demonstrated the hostile policy adopted by Virginia with reference to religious corporations, and denied that the Act of Elizabeth or its principles entered into the jurisprudence of Virginia; and see *The Literary Fund v. Dawson*, 10 Leigh, 147; *Janney v. Latane*, 4 Leigh, 227; *Brooke v. Shacklett*, 13 Gratt. 301; *Stonestreet v. Doyle*, 75 Va. 356. In *Seaburn's Executor v. Seaburn et al.*, 15 Gratt. 423, it was argued that the Code, Ch. 77, § 8, p. 362, viz: "Every conveyance, devise or deed shall be valid which since the first day of January, 1777, has been made, and every conveyance shall be valid which hereafter shall be made for the use or benefit of any religious congregation as a place for public worship," etc., legalized prospective devises to corporations, and gave an enforcing power to the courts in cases of charities; but the court held otherwise.

What seemed to be the settled and undoubted law of Virginia has now been entirely unsettled, if not altogether overthrown, by a very recently published decision, *The Protestant Episcopal Education Society v. Churchman's Representatives*, 80 Va. 718. That case, decided in 1885, arose upon the will of one Dr. Churchman by which certain bequests, comprising both realty and personality, were made, to the Protestant Episcopal Education Society, "to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established." The Circuit Court held the bequests void upon the grounds (1) that the gift was not absolute to the corporation for its own use as a corporate body; (2) that the uses and trusts declared were religious in their character, and too vague and indefinite to be upheld under the law of the State, or to be administered in chancery even if they were merely educational, as contemplated by § 2, Ch. 77, of the Code of 1873. Upon appeal, the decree of the Circuit Court was reversed—three Judges, LACY, FAUNTLEROY and RICHARDSON concurring in the reversal, while LEWIS, P. and HINTON, J., dissented. In delivering the opinion of the Court, RICHARDSON, J., after holding that the corporation could be a trustee for purposes congenial to the objects of its creation, passed on to the consideration of the objection that the trust would have been void at common law, and said: "In Virginia it may be truly said, in respect to the doctrine laid down in *Gallego v. Attorney-General*, not exactly what is understood by the maxim '*communis error facit jus*,' but that for

a long time that doctrine has been the only foundation in this State for the ‘common error’ in respect to charitable trusts.” He then proceeded to argue that the doctrine as held in Virginia had not its birth in her courts, but had originated in a hasty following of the *Philadelphia Baptist Association v. Hart's Executor*, 4 Wheat. 1 and “was an error copied from the Supreme Court of the United States, in which court it has long since been repudiated as palpable error, though to some extent it has still been persisted in here;” that it was wholly immaterial whether the Statute of Elizabeth ever were in force in Virginia or not (and upon the statute the prior decisions had been made to turn) for “that statute created no new law; it only created a new and ancillary jurisdiction by commission to issue out of Chancery to inquire whether funds devoted to charitable purposes had been misapplied,” and there was in Virginia no statute *for-bidding* courts of equity to exercise jurisdiction over charitable trusts, and such being the case, such jurisdiction could be exercised by virtue of the court’s inherent power; that there was, in 1832, when *Gallego v. Attorney-General* was decided, no pronounced policy hostile to charitable trusts—and continued: “For these reasons, after a careful survey of the subject, we feel constrained to hold that the doctrine laid down by Judge TUCKER in *Gallego v. Attorney-General* cannot be upheld upon either principle or authority. . . . But whatever may have been the real or the supposed legislative policy of this State when *Gallego v. Attorney-General* was decided, the Legislature has since, in clear and unmistakable terms, marked out, as applicable to cases like the one now under consideration, a policy distinctly opposed to the doctrine laid down in that case, as commonly understood and contended for. The policy thus set on foot, and now the controlling law of the subject, is clearly indicated in sections 2 to 10 of Ch. 77 of the Code of 1873. The said second section is broad and comprehensive in its terms. It makes valid every transfer of property, real and personal (other than for the use of a theological seminary), which has been made since the 2d day of April, 1839, or which shall hereafter be made by gift, grant, devise or bequest for literary purposes, or for the education of persons within this State; and it is declared that the conveyance, whether made ‘to a body corporate or *unincorporated*, or to a natural person shall be as valid as if made *to or for the benefit of a certain natural person*;’” then, after reviewing the other sections of the chapter: “Thus, fully rounded, we have the legislative policy of this State upon the subject of charitable bequests for literary and educational purposes. It is important to keep prominently in view the fact that the prime object of the Legislature was to give authoritative expression to the validity of charitable trusts. Hence, in *Roy's Ex'rs v. Rowzie*, 25 Gratt.

599, MONCURE, P., commenting on the Acts of 1839 and 1841, as now embodied in the Code of 1873, says: 'The only purpose was, and only effect is, to make valid a certain class of indefinite charities.' Further on in the same case, the same Judge says, 'the purpose of the Acts of 1839 and 1841 was to make valid a certain class of donations which had never been valid before.' For reasons already stated we do not assent to the view that the legislation referred to was actually necessary to make valid donations to charity which were not valid before. But being of opinion that such donations were valid at common law, and that the common law principle involved has not been repealed in Virginia, we regard the Acts in question, so far as they go, as simply declaratory of the common law principle which had been denied in *Gallego v. Attorney-General*, but subject to the limitations and restrictions imposed by statute. . . . In any view and according to the plain letter of the law, the bequests in this case are in every respect as definitely and clearly stated as it is possible to describe a charity for such a use. This being so it necessarily follows that the second proposition announced in the decree, that these bequests are null and void because too vague and indefinite to be upheld under the law of this State, or to be administered by a court of equity, is palpably erroneous and must be rejected." We have considered this case at some length, because, if sustained to the full extent of the opinion, it will revolutionize the Virginia law of charities. The decision might well have been sustained upon the chapter of the Code referring to educational trusts, and by regarding them as exceptions to the general rule; but it will be observed the court went farther and expressly recognized the inherent power of equity over charities, utterly repudiating the doctrine held in a long line of cases. In this we think the court was undoubtedly right, and the opinion, which will repay careful study, as will also the note of argument filed by ex-Judge BURKS, of counsel for appellant, is a most able presentation of the law of the subject, but, in view of the slender majority by which the case was decided, it may be doubted whether when the question is presented, with reference to a charitable trust of a non-educational character, a change of membership in the court may not result in an opinion confining the effect of the Protestant Episcopal Educational Society case to cases of educational trusts. We are fully convinced of the soundness of the opinion to its full extent, but this doubt merely suggests itself in view of the fact that a long line of authority has been overturned in a case, in which, although a very fitting occasion was afforded for doing so, the same decision could have been rendered for a reason which would not have affected the principle upon which the earlier decisions rested.

In Maryland, it was at one time held that under the bill of rights, the

Statute of Elizabeth or its principles were in force so far as concerned a sale, gift, lease or devise of a quantity of land, not exceeding two acres, for a church, place of worship or burying ground, *Beatty v. Kurtz et al.*, 2 Pet. 566; but unless this may be regarded as an exception rather than the result of the grant of a substantial right, the law in Maryland is settled that the Statute of Eliz. 43, is not and never has been in force in that State, see Kilty's Report, and in consequence it has been, repeatedly, held that there is no jurisdiction in chancery to uphold or enforce a bequest to a charity, which if not to a charity would, upon general principles, be void, *Dashiell v. Attorney-General*, 5 H. & J. 392; *Dashiell v. Attorney-General*, 6 Id. 1; *Meade v. Beale*, Taney C. C. Dec. 339; *Trippie v. Frazier et ux.*, 4 H. & J. 446; *Needles v. Martin*, 33 Md. 609; *Rizer v. Perry*, 58 Md. 112; *Presbyterian Church v. White's Adm'r*, 4 Am. Law Reg. 526; *Church Extension of the Methodist Episcopal Church v. Smith*, 56 Md. 397.

In Massachusetts, the Statute of 43 Eliz. is said to be in force, *Going v. Emery*, 16 Pick. 107, but the jurisdiction of the court is not confined to the subjects mentioned therein, or its procedure to one strictly analogous thereto, see *Burbank v. Whitney*, 24 Pick. 146.

In Maine, the statute has been regarded as part of the common law of the State, not, however, as furnishing the basis of the equitable jurisdiction of the courts with reference to charities, but as being incorporated therein, see *Tappan v. Deblois*, 45 Me. 122, in which DAVIS, J., in delivering the opinion of the court, said: "Before that statute Courts of Chancery may not have had power to enforce trusts for indefinite charities, especially if no trustees capable of taking were interposed, and ever since that time if the bequest is so imperfect and vague that the intention of the testator cannot be ascertained it will be declared void. But if the trust is expressed and is sufficiently definite to be understood and is consistent with the rules of law, it will be enforced either under the Statute of Elizabeth or independent of it," and see also *Howard v. American Peace Society*, 49 Me. 288, and *The Preachers' Aid Society v. Rich*, 45 Me. 552, in which last cited case TENNEY, C. J., said: "The better opinion of the most eminent jurists in England and in this country is that a donation to charitable uses could be carried into effect in chancery without the aid of the Statute of Elizabeth."

In Indiana, in the case of *McCord v. Ochiltree*, 8 Blackf. 15, it was said that the Statute of Elizabeth was in force, "except one or two principles," and see *Sweeney v. Sampson*, 5 Ind. 465; *Common Council v. State*, Id. 334; but in *Grimes v. Harmon*, 35 Id. 198, so much of *McCord v. Ochiltree*, as held that the statute was in force was overruled, and the courts of Indiana now base their power to administer and sustain charitable trusts upon principles of equity independent of the statute, *Board of*

Commissioners of Lagrange Co. v. Rogers, 55 Ind. 297; *Erskine v. Whitehead's Executors*, 84 Id. 357.

In Illinois, the principles of the statute are in force, and its equity has been extended; see *Plumleigh v. Cook*, 13 Ill. 669; *Heuser v. Harris*, 42 Id. 425; *Andrews v. Andrews*, 110 Id. 223.

In Rhode Island, a colonial statute strongly resembling the statute of Elizabeth was passed in 1721; it omitted, however, the long enumeration of charities contained in its English predecessor, and mentioned but two, "relief of the poor, and bringing up children to learning," and, for the commissioners provided for in the English Act, substituted the town council, giving an appeal from its action to the governor and council; in 1765, the appellate authority was vested in the Supreme Court, and in 1844, the preamble was omitted, and to the short list of charities was added, "or for any other specified purpose." The courts, however, have recognized as existing in them a general authority with respect to charities, quite independent of any conferred by statute, and hence have held that the charities enforceable are not confined to those enumerated in the statute; see *Derby's Executors v. Derby et al.*, 4 R. I. 414; *Potter v. Thornton*, 7 Id. 262; *Pell v. Mercer*, 14 Id. 412.

In Georgia, the principles of the statute were early recognized as in force, *Beall v. Surviving Executors of Fox*, 4 Ga. 404. Subsequently, on the adoption of the code, a full and complete jurisdiction to enforce and carry into effect charitable dispositions was conferred by §§ 2468, 3155, and 3157, and the heads of charity were enumerated in § 3157, as follows:

1. The relief of aged, impotent, diseased or poor people.
2. Every educational purpose.
3. Provision for religious instruction or worship.
4. The construction or repair of public works or highways or other public conveniences.
5. The promotion of any craft or persons engaging therein.
6. The redemption or relief of prisoners or captives.
7. The improvement or repair of burying grounds or tombstones.
8. Other similar subjects having for their object the relief of human suffering or the promotion of human civilization.

In New Jersey, it is said that upon the question of what is and what is not a charity, the common law, as interpreted by the decisions founded on the statute of Elizabeth, is in force, *Thomson's Executors v. Norris*, 20 N. J. Eq. 489; *DeCamp v. Dobbins*, 29 Id. 36.

In Delaware, the equitable jurisdiction of the Chancellor with reference to charities is held to exist independently of the Statute of Elizabeth, *Griffith v. State*, 2 Del. Ch. 421.

In Tennessee, the equitable jurisdiction is held not to rest on the statute, for it is said that the statute is not in force but that so much of its pro-

visions as was law before it was passed is law in Tennessee, *Dickson v. Montgomery*, 1 Swan, 348; it had previously been held that the practice prescribed by the Act was not applicable to Tennessee, and it was emphatically denied that there existed in that State anything akin to the power of the king as *parens patriæ*, *Green v. Allen*, 5 Humph. 170.

In South Carolina, the jurisdiction over and in aid of charities is firmly established. As early as 1843, HARPER, Ch., said: "It appears very satisfactorily that, supposing the jurisdiction not to have existed before the Statute 43 Elizabeth, it has grown up since and has become so firmly established as to be authority with us, and this not by virtue of the Chancellor's authority in administering the king's prerogative, but of his own proper chancery jurisdiction," *Attorney-General v. Jolly*, 1 Rich. Eq. 99, and see *Gibson v. McCall*, 1 Rich. L. 174.

In North Carolina, it is said that the statute is in force, but that if it were not the power of the State succeeding the king as *parens patriæ* would be sufficient to sustain the jurisdiction over charities, *Griffin v. Graham*, 1 Hawks, 96.

In Kentucky, the statute was held in force as to its objects, but not as to the form of procedure under it, *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354. Messrs. Morehead and Brown in a note to their edition of the Kentucky Statutes, published in 1834, say that the statute has never been repealed and that it contains nothing of so peculiar or local a character as to exclude it from adoption under the rule embracing all English statutes of a general character prior to 4 Jas. I., and it was so held in *Gass & Bonta v. Wilhite*, 2 Dana, 170, but this must be taken with the modification announced in the case in 4 Dana, *supra*.

By the Revised Statutes trusts for the following purposes are recognized: for seminaries, colleges, universities, for the use of churches, the relief of the poor, of sick and maimed soldiers and mariners, for the benefit of navigation, for bridges, ports, causeways, public highways, houses of correction, hospitals, asylums, for idiots and lunatics, deaf and dumb, blind, in aid of young tradesmen, orphans, redemption of prisoners and captives, setting out of soldiers. Gen. Laws (Bul. & Fel.) Ch. 13, § 1.

In Vermont, the principles of equity are said to give the jurisdiction over charities independently of statute, *Executors of Burr v. Smith*, 7 Vt. 241.

In Ohio, the statute is not in force, but charitable trusts are administered by virtue of the general power of equity, and the principles of the statute are incorporated in the law, *Trustees of the McIntire Poor School*

v. Zanesville Canal and Manufacturing Co., 9 Oh. 287; *Ummey's Executors v. Wooden*, 1 Oh. St. 160.

In Alabama, the equitable jurisdiction is recognized as existing independently of the statute, *Carter et ux. v. Balfour's Administrator*, 19 Ala. 814; *Williams v. Pearson*, 38 Id. 299.

In Pennsylvania, while the statute is not reported as in force, see report of the judges, 3 Binney, App., its principles have always been recognized as part of the law, *Witman v. Lex*, 17 S. & R. 90; *Babb v. Reed*, 5 Rawle, 157; *Magill v. Brown*, Bright. 347; *Thomas v. Ellmaker*, 1 Pars. Eq. 98; *Pepper's Will*, Id. 436; *Bethlehem Borough v. Perseverance Fire Co.*, 81 Pa. St. 445; *Domestic and Foreign Missionary Society's Appeal*, 30 Id. 425, as said by SERGEANT, J., in *Zimmerman v. Anders*, 6 W. & S. 218, "though the statute 43 Eliz. is not in force in Pennsylvania, it would seem it is so considered, rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions; these, I conceive, have been in force here by common usage and constantly recognized, and not only these but the more extensive range of charitable uses which chancery supported before that statute and beyond it." And it is also held that the equitable powers exerted in support of charitable uses are founded rather in necessity and in the constitution of a Court of Equity than on the provisions of the statute, *Methodist Church v. Remington*, 1 Watts, 218.

In New York, the question of the prevalence of the English doctrine was long a matter of dispute, as was also that of the effect upon charitable devises of the repeal in the Revised Statutes of all uses and trusts except those specifically mentioned; and the two subjects have become so interwoven that we may profitably consider them together; and, first, it may be said that it was generally held, in the courts of first instance, that the Statute of Elizabeth was never in force in New York, see *Wright v. Trustees*, 1 Hoff. 202; *Kniskern v. Lutheran Churches of St. John and St. Peter*, 1 Sand. Ch. 439; *Dutch Church in Garden Street v. Mott*, 7 Paige, 77; *Shotwell v. Mott*, 2 Sand. Ch. 46; and that there was amongst such courts a difference of opinion as to the existence, in New York, of the doctrine of charitable uses. In an unreported colonial case found in a manuscript volume of the orders of the Court of Chancery, held by the Governor and Council in 1708, an information by the attorney-general, against one Cullin, to compel the payment of a legacy for the benefit of the poor, was sustained, and from the pleadings the ground of sustentation seems to have been the doctrine of pious and charitable uses (see 8 N. Y. 554); but this case seems never to have been used as authority, possibly on account of the character of the court by which it was decided, and, indeed,

to have been lost sight of; and, as evidence of the difference of opinion to which we have alluded, we have, as sustaining the theory of the prevalence of the doctrine, the cases of *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *Kniskern v. The Lutheran Churches*; *Shotwell v. Mott*, *supra*, and as questioning or repudiating it, *Yates v. Yates*, 9 Barb. 324; *Ayres v. Trustees of the Methodist Episcopal Church*, 3 Sand. Sup. C. 351; *Andrew v. The New York Bible and Common Prayer Book Society*, 4 Id. 156; and there was no decision upon the subject by the court of last resort. It is true that in *McCartee v. The Orphan Asylum*, 9 Cow. 437, the Court of Errors did reverse a decree of JONES, Ch., which asserted the doctrine of charitable uses, but, as shown by DENIO, J., in *Williams v. Williams*, *infra*, the only grounds given in the opinion for reversal went upon the questions whether the devise were to the corporation defendant directly, and whether a charitable corporation, not authorized to take by devise, could take notwithstanding the exception in the Statute of Wills. Such was the condition of the law when the case of *Williams v. Williams*, 8 N. Y. 525, came, in 1853, before the Court of Appeals, the question of the existence of the doctrine of charitable uses being complicated by the fact that the Revised Statutes had abolished all uses and trusts, not arising by implication of law, except trusts to sell lands for the benefit of creditors; to sell, mortgage or lease lands for the benefit of legatees or to satisfy any charge thereon; to receive the rents and profits and apply them to the use of a person for his life or a shorter time; to accumulate rents or profits for the benefit of one or more minors in being during their minority, R. S., Pt. 2, Ch. 1, Tit. 2, §§ 45, 55; Stat. 1846, Ch. 74; 1855, Ch. 432. In *Williams v. Williams*, amongst other bequests, there was one, to one Oakley and others and their successors, of a fund for the exclusive education of the poor, "who shall be educated in the academy in the village of Huntington; or in case of the destruction of the academy by fire, or otherwise, then in the school-house next west of the academy, until it shall be rebuilt." The legality of this bequest was questioned. The case coming before RUGGLES, V. C., he declared the legacy valid. This decision was reversed by a general term of the Supreme Court held in Kings County, and an appeal was taken. The opinion of the Court of Appeals was delivered by DENIO, J.; and as, although it has since been departed from, it is an able setting-forth of the argument in favor of the prevalence of charitable uses, notwithstanding the abolition of trusts, it will repay consideration. The learned judge said: "If the Revised Statutes apply to gifts for charitable purposes this objection is fatal to the bequest. According to the law of England as understood at the time of the American revolution, and as it exists at this day, conveyances, devises and bequests for the support

of charity and religion, though defective for the want of such a grantee or donee as the rules of law require in other cases, would (when not within the purview of the Mortmain Act) be supported and established in the Court of Chancery. This I understand to be entirely undisputed, *Case of Christ's College, Cambridge*, 1 Wm. Blackstone's Rep. 90; *Moggridge v. Thackwell*, 7 Ves. 36. . . . So far as my researches have gone I have found no case or dictum which would cast a doubt upon the validity of this bequest in the courts of England at any time during the century preceding the nineteenth day of April, 1775. Having adopted the common law of England, so far as it was applicable to our circumstances and conformable to our institutions, the law of charitable uses is in force here, unless, *first*, it was established by an English statute which has been abrogated; or, *secondly*, unless there is something in the system repugnant to our form of government; or, *thirdly*, unless it can be shown by the history of our colonial jurisprudence that it was not in force here prior to the revolution; or, *lastly*, unless it has been abolished by the Revised Statutes." He then proceeded to consider the contention that the doctrine of charitable uses rested upon the Statute of 43 Eliz., and after reviewing the authorities, continued: "The whole object of the Statute of Elizabeth seems to have been to provide the form of a remedy against the abuse of charities. That form has been long since abandoned, and relief in that class of cases is now sought under the ordinary forms of justice in use in the Court of Chancery. The present English doctrine of charities does not, therefore, depend upon the statute, so far as the course of proceeding is concerned; for nothing could well be more dissimilar than the two modes. It cannot be said that the existence of charitable gifts originated in the statute, for the preamble shows that the object in passing it was to reach gifts already in existence, to redress breaches of trust which had been committed by the trustees under donations theretofore made. If we suppose charitable donations to have been void before this statute, then the proceedings which it authorizes were intended to strip heirs and next of kin of their property and to set on foot a class of eleemosynary establishments in violation of vested legal rights. It would have been an act of power which would not have failed to excite the attention of the historians and judges of that age or of succeeding times; but I have not been able to find that such a view has ever been hinted at. Much significance has been attributed to the repeal of this statute by the Legislature of this State; especially as the Act of 9 Geo. II. Ch. 36, restraining gifts to charitable uses under certain circumstances, was not re-enacted, but was also repealed. The truth is, the Statute of Charitable Uses was wholly inapplicable to the circumstances of this country, and

could never have been executed in a single instance if it had been expressly re-enacted. Our political system knows no ecclesiastical divisions, no dioceses and no bishops. No commission could, therefore, have ever been issued. This was a sufficient reason for repealing the statute; but besides the English Court of Chancery had long been accustomed to exercise a jurisdiction over charities quite independent of the statutory proceeding which had become practically obsolete. No inference can, therefore, be drawn from its repeal hostile to the legal existence and validity of charitable gifts. The most that can be said is, that we repealed an obsolete statute providing one mode of enforcing them, which was inapplicable to the situation of the country. The repeal of the Statute of Mortmain, if it was ever considered in force here, was a more significant act, but of a different tendency, I think, from that suggested. We may reasonably infer from it an intention to give the greatest scope to the founding and endowing of institutions and trusts for promoting education and religion and for the amelioration of those evils from which society under the happiest conditions is never exempt. We were in the main destitute of such establishments, while the mother country, from which we had just separated, so abounded with them that it had become necessary to restrain gifts in their favor by public authority. The manner in which the statutes are dealt with by the Legislature of 1788, in my judgment, affords no ground for holding that the peculiar doctrines of charitable uses, and the jurisdiction which the Court of Chancery exercised over them, were intended to be abrogated, but leads to a directly contrary inference. But it is said that, in cases of charitable trusts, the English Court of Chancery continually refers to the Statute of Elizabeth, to ascertain whether the trust is such a one as it ought to execute. This by no means proves that the jurisdiction was conferred by the statute. There were no reports of cases in chancery prior to the 43d of Elizabeth, but the Parliament must be supposed to have been acquainted with this class of cases which had been antecedently held, and which the judges and the legal profession had considered good charitable gifts; and when a question subsequently arose, it was most natural for the court to refer to this legislative definition. The argument was this: At an early day, before the practice of reporting, we find that the Legislature, when providing a summary process for abuses of charitable trusts, enumerated their various kinds. We take this enumeration as a safe general guide, and such gifts as fall within the description and such others as bear an analogy to them we will hold to be valid. Such uses are daily made of ancient statutes in settling the principles of the common law; and had the statute been repealed in England, instead of becoming obsolete, as was actually the case, it would still be

referred to in ascertaining what should be allowed as a valid charitable gift. It was in this sense that Sir William Grant, Master of the Rolls, referred to the statute when he said: 'The signification of charity is derived *chiefly* from the statute of Elizabeth. Those purposes are considered charitable which the statute enumerates or which by analogies are deemed within its spirit and intendment, and to some such purpose every bequest to charity generally shall be applied,' *Morice v. The Bishop of Durham*, 9 Ves. 405. So Lord Chancellor Eldon, in the same case upon appeal, declared that 'where the gift was to *charity generally*, it was the duty of the court to decree it to be applied to charity in the sense which the determinations have affixed to that word in this court, viz: either such charitable purposes as are expressed in the statute or to purposes having analogy to these,' 10 Ves. 541. In this country, the question whether a gift to a particular purpose is a valid charitable gift is to be resolved by a reference to the determinations of the English Court of Chancery, whether that court reposed itself upon the Parliamentary definition or arrived at its judgment in any other manner. I do not think it was ever said by any English judge, that the proceeding in charity cases by information, was authorized by, or founded upon the statute. I concede that the English doctrine is in force here only so far as it is adapted to our political condition. In that class of cases, therefore, where the gift is so indefinite that it cannot be executed by the court, and where the purpose is illegal or impossible, the claim of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are entrusted only with judicial authority. Where the gift is capable of being executed by a judicial decree, I know of no reason why the court should refuse to execute it. . . . There is here a good trustee to take the funds in the first instance; and a succession of trustees may be provided by the court by new appointment as often as circumstances may require. The trust is for the education of the children of the poor at a particular institution of learning, which I presume to be an incorporated academy, and a rule of ready application is given for selecting the objects of the testator's bounty. It is true that no locality is prescribed, but practically, they will be chosen from families residing in the vicinity of the academy. If there should be an excess of beneficiaries it will become the duty of the trustees to select such as are to enjoy the benefit of the legacy.' After reviewing the New York cases, the learned judge passed on to the consideration of the effect of the Revised Statutes, and said: "The Revised Statutes were enacted with a constant reference to the then existing law. Changes were not made for the mere purpose of innovation, but with a steady eye to the maxim

which enjoins a strict attention to ‘the old law, the mischief, and the remedy.’ The old law was well defined; any number of lives might be selected, to which evidence would apply, and the estate might be rendered inalienable until the last survivor should die and for more than twenty-one years afterwards. What the Legislature undertook to do was simply to shorten the period of suspension. Not a day was allowed as an absolute term; the *cestuis que trust* could not exceed two; and trusts for accumulations were strictly confined to minorities. And this, in my opinion, is all the change the Legislature intended to make. There is no reason to believe that it was designed to extend the law against perpetuities to cases to which it had never been applied and had never been intended to reach. It was certainly competent to abolish the law of charitable uses either in whole or in part. Had it been thought desirable to limit and modify it, the Statute of Mortmain (9 Geo. II. 36) was a pattern act, which could scarcely be improved, and which might readily have been extended to personal property, and if it had been designed to abolish such gifts altogether, it is inconceivable that it should not have been done in language, which would have contained at least some allusion to that branch of the law. To limit charitable trusts, which in their nature involve the idea of indefinite continuity, by two lives in being is substantially to abrogate them; and this I am sure would have been done by express and unequivocal language, had it been intended to do it at all. This view of the subject is entirely satisfactory to my mind, for I cannot conceive a reason why the law of perpetuities contained in the Revised Statutes should be held to be more extensive in its application to subjects than the former law of perpetuities, of which it was a revision; which clearly did not embrace gifts to charitable uses. . . . The result of my examination of the case is that the law of charitable uses, as it existed in England at the time of the Revolution and the jurisdiction of the Court of Chancery over these subjects became the law of this state on the adoption of the Constitution of 1777; that the law has not been repealed, and that the existing courts of this state having equity jurisdiction are bound to administer that law.” In this opinion RUGGLES, C. J., MASON, MORSE, and WILLARD, JJ., concurred, and from it GARDINER, JOHNSON, and TAGGART, JJ., dissented. On its authority *Tucker et al. v. The Rector, Church Wardens, and Vestrymen of St. Clement's Church*, 8 N. Y. 558; and *Andrews et al. v. The General Theological Seminary et al.*, Id. 559, were decided, and see *Owens v. Missionary Society*, 14 Id. 380; *Beekman v. Bonsor*, 23 Id. 298; *Downing v. Marshall*, Id. 366. *Williams v. Williams*, however, did not settle the law in New York, and we find the subject re-examined at length in 1865, in the case of *Levy v. Levy*, 33 Id. 97. WRIGHT, J., who delivered

the opinion of the court said: "An attentive study of the legislative history of the state will lead to the conclusion, that if the legislative power has not succeeded in extirpating the law of charitable uses, as it prevailed in England in 1775, and establishing a state policy and system of her own in respect to indefinite uses, either for charity or religion or any other purpose, the intention has plainly existed to do so. It is difficult, not to say impossible, to satisfactorily account for state legislation, beginning soon after the formation of the government and continued down to the present time, upon any other theory. It may be conceded that the Record Commission of 1827 shows that prior to the Statute of 43d Elizabeth, the English Chancery, by bill and information in the name of the Attorney-General, and it may be by intervention of an *amicus curiae*, exercised a loose and imperfect jurisdiction in enforcing trusts for certain 'charitable purposes.' Be it so, and let it be conceded that, prior to the statute, what were afterwards denominated in the law of the British realm 'charities' and 'charitable uses' were sometimes enforced in chancery, independently of the royal prerogative, still it remains true, as matter of fact, that when the first State Constitution was adopted, and in the infancy of the State government, it was the universal opinion in England and this country, among lawyers and jurists, that all charitable trusts depended for their validity and had their origin in the Statute of Elizabeth. . . It is to be supposed that the Legislature, in 1788, had the same understanding of the law on this subject, as the judges and lawyers of that time. In 1788, the Legislature by a general enactment repealed the Statute of Elizabeth, the statute against superstitious uses and the Mortmain Acts, including that of 9 Geo. II. (2 Greenleaf's Laws, 136, § 37), thus sweeping away all the great and distinctive landmarks of the British system. Why this repeal of a statute defining what in English law and jurisprudence were charities, unless the Legislature intended by the Act, and supposed that would be the effect of the repeal, to abrogate the entire system of indefinite trusts which were understood to be supported by that statute alone. . . And then the repeal of the Statute of Mortmain, still more significantly evidenced an intention to abrogate the system. The Mortmain Act of 9 Geo. II. was enacted to restrain the sweeping influence of the Statute of Elizabeth. . . It is not to be assumed that the sagacious men who shaped the legislation of the State in the early periods of the government, would designedly leave in force a system of indefinite trusts, without any restraint whatever, when the experience of the mother country had shown that a system of public or charitable uses, without legislative definition and restraint, was not to be tolerated. It cannot be reasonably inferred, from a repeal of the great Mortmain Act, so called, an intention, in a State without

an established religion to give full scope to the founding and endowing of all sorts of religious establishments, and putting in mortmain for their benefit the property of the State. From the beginning the founders of the government clearly indicated a different policy from that which prevailed in England in respect to trusts for charitable and religious purposes. The policy was not to introduce any system of public charities except through the medium of corporate bodies. Accordingly before and contemporaneously with the repeal of the Statute of Elizabeth and the Mortmain Acts, in addition to the general law of 1784 for the incorporation of religious societies, special acts for incorporating such societies were passed. There were likewise other acts passed, creating or authorizing corporations for various religious and charitable purposes; in all of which are to be found limitations upon the amount of revenue to be held by such societies and the purposes to which it is to be applied and requirements for furnishing inventories and reporting any excess of property to the Legislature. This legislation indicates that the policy, from the foundation of the government, was to confine within certain and narrow limits the accumulation of property perpetually appropriated even to charitable and religious objects. The absolute repeal of the Mortmain Act, and of the Statute of Elizabeth, was wholly inconsistent with the policy thus indicated, except only upon the ground of the understanding and conviction of the early legislators of the State, that charitable uses, if they had ever existed in the colony or State, were not founded upon or sustained, except by force of the latter statute, for the effect of that repeal, with other British statutes, was to remove (it being true that indefinite charities were maintainable in chancery without its aid), every restraint upon individual action, and put it in the power of any man to appropriate his whole property in perpetuity to the purposes of charity or religion, making the Court of Chancery his trustee. How idle was it for the Legislature to limit so carefully the powers they bestowed upon religious and charitable corporations. How useless for benevolent individuals to seek acts of incorporation or to trust private trustees when the Court of Chancery, upon the mere will of the founder of the charitable gift, would insure its perpetuity and superintend its administration. To my mind the evidence is irresistible, that the Legislature of 1788 intended to abrogate (and that was the effect of their action) the whole law of charitable uses as understood and enforced in England. If the law of charity, as it existed at the time of the revolution, was based upon the Statute of Elizabeth, then the repeal of that statute directly worked its abrogation. If the system of indefinite charities could be enforced in equity prior to the statute, it was, nevertheless, the intention by such repeal to abrogate the

system; and the effect of the repeal and the contemporaneous initiation of a different policy, and one better suited to our social and political condition, was to effectually displace it.

"It is unnecessary, however, to rely exclusively upon the early legislative action referred to in determining whether the State has not by her laws and policy rejected the British system and substituted and established a different one resting upon legal principles and enactments." [His Honor then reviewed the various acts bearing upon religious and charitable corporations and trusts, viz: the Acts of 1874, April, 1796, 1852, Ch. 395; the special Acts mentioned in Gillett's Index, pp. 171-178, 373-397; Acts of 1840, Ch. 318, 1846, Ch. 74, 1848, Ch. 319; 1849, Ch. 273; 1862, Ch. 273; 1860, Ch. 360.] . . . "It is obvious that with us no object can be charitable, in a legal sense, that has not the legislative sanction. We have no general statute defining what is charity in law. The gift, in the present case, is said to be a *charitable* use, and so it is in a general sense and within the Statute of Elizabeth. But we have no statute declaring what is legal charity. Here, necessarily, in respect to charity or uses public in their nature, where the Legislature has not defined or sanctioned the particular object to be promoted, it can only be dealt with by the courts as a question of uses without a beneficiary—uncertain trusts without any equitable donees known to the law. . . . In my judgment, then, that peculiar system of English jurisprudence for supporting, regulating and enforcing public or charitable uses, void by the rules of law, is not the law of the State. . . . I am aware that the question has been heretofore incidentally examined in this court with great power and ability, and an opposite conclusion reached by a majority of its members. . . . In *Williams v. Williams*, it was held that the English law of charitable uses was the law of the State; and consequently a bequest to three persons (naming them) and to their successors to be appointed by themselves, in trust for the education of the children of the poor, who shall be educated in the academy in the village of Huntingdon, was upheld. Neither the trustees nor beneficiaries were legally ascertainable nor had the trustees legal capacity to take and administer the gifts; but that made no difference if the English doctrine of charitable uses was to be applied to the bequest. Three years afterwards, in *Owens v. The Missionary Society of the M. E. Church*, 4 Kern. 380, the question again arose. . . . Judge SELDEN again examined the question of the introduction of the law of charity, as understood and enforced in England, into the law of the State, and reached directly the opposite conclusion to that enunciated in *Williams v. Williams*, holding that the law was not in force here, and as a consequence the bequest could not be sustained. In this opinion a major-

ity of the court concurred. . . . The judge, in his opinion, undertook to distinguish the case from *Williams v. Williams*, on the ground that in the latter there were competent trustees to take the fund in the first instance, whereas in the former there were none. This was, as a matter of fact, a misapprehension. There was not, in either case, any ascertained or competent trustee. In one the bequest was in trust to a voluntary association of persons; in the other to three persons named by the donor, and both equally unknown to the law. It was this misapprehended distinction, together with an erroneous *dictum* to be noticed, that probably induced the remark in *Beekman v. Bonsor* (23 N. Y. 298), that the diversity of views of the judges delivering opinions in the two cases on the question of the introduction of the law of charitable uses into the law of the State, led to no practical difference in conclusion or result. So, also, the judge appeared to think, that, independent of the peculiar system of jurisprudence in regard to indefinite charitable gifts, if, in a devise or bequest, a trustee was named for a definite purpose, a legal and valid trust would be created, although there was no ascertained beneficiary. This was mere *dictum*, not countenanced by his associates, and running counter to all authority prior to the case, although approved since by a former judge of this court. The proposition is false in both its branches. A trustee is not necessary to the validity of a trust, for a use being well declared the law will find a trustee wherever it finds the legal estate; and the definiteness of the *purpose* of the trust does not make a good use if there is no definite object or beneficiary. The value of the decision consists in a deliberate protest, at the earliest time, against the conclusion, so ably enunciated in *Williams v. Williams*, that the law of charitable uses, existing in England at the period of the American Revolution, is now the law of the State. In *Marshall v. Downing*, 23 N. Y. 366, a gift to the American Home Missionary Society, an unincorporated association, was held void. It was admitted that the society was a charitable organization and the gift for charitable or pious purposes. It is true that there was no competent trustee or any ascertained beneficiary to take the gift, and in whom an equitable interest could vest, and hence a valid common law trust was not created; but if the 'law of charity' prevailed here there would have been no difficulty in upholding and effectuating the bequest. . . . So that in at least two cases in this court, since *Williams v. Williams*, has the principle that decided one of the bequests in the latter case to be valid been disaffirmed. It being true, then, that trusts for 'charity' have no peculiar privilege in the courts of this State over other trusts of property, it follows that the one attempted to be created by the testator in the present case, is invalid for want of a *cestui*

que trust in whom the equitable title to the estate devised and bequeathed could vest. There is no ascertained beneficiary in whose favor performance may be enforced. The gift is for the use and benefit of an indefinite object." Later in the opinion the learned judge considered the effect of the Revised Statutes, saying, *inter alia*: "The language is general and comprehensive. . . . In *Williams v. Williams* it was conceded to be broad enough to include devises to charitable or indefinite uses; although by an ingenious and plausible course of reasoning the conclusion was reached that the Legislature did not intend to include limitations to such uses. It was necessary, of course, in reaching the conclusion, to reason from circumstances *de hors* the plain letter of the statute and on the assumption that the English law of charity existed here. The argument was this: The rule against perpetuities, as it existed in England at the time of the revision of the statutes, did not apply to what were recognized as charitable trusts; that it was well understood that gifts to 'charities' formed an exception to the operation of the English rule; that the Revised Statutes were enacted with a constant reference to the then existing law, changes not being made for the mere purpose of innovation; that all the Legislature undertook to do was simply to shorten the period of suspension and not to extend the law of perpetuities to cases to which it had never been applied, and had never been intended to reach; that it was competent to abolish the law of charitable uses, either in whole or in part, and had it been designed to abolish such gifts altogether, it is inconceivable that it should not have been done in language which would have contained at least some allusion to that branch of the law; that to limit charitable trusts which in their nature involve the idea of indefinite continuity by two lives in being is substantially to abrogate them, and this would have been done by express and unequivocal language had it been intended to do it at all. This line of argument necessarily assumes that neither the revisers nor the Legislature understood the force or effect of language, or the nature of a 'charitable' limitation. The deduction is not from what the Legislature did, but from the improbability of the legislative intention, by the use of general language, to substantially abrogate charitable trusts, as this would be the effect by limiting them by two lives in being. The conclusion is jumped at that all the Legislature undertook to do was to shorten the period of suspension, from any number of lives in being and twenty-one years to two lives in being, and not to shape a rule that would embrace charitable trusts, to which the English rule against perpetuity, not statutory, but judicial—a gradual growth and creation of the common law commencing long after the Statute of Elizabeth—had not generally been applied. If this be so, and limitations for what are denominated in Eng-

lish jurisprudence 'charities' form an exception to our rule, the explicit words of the statute must be disregarded and the first principles of statutory construction violated. The precise and comprehensive language of the statute is, that the absolute power of alienation of real estate and the absolute ownership of personality shall not be suspended by any limitation or condition whatever for a longer period than two lives in being. There is no exception in favor of indefinite charities. . . . The trust is void under our statutes of uses and trusts. All express trusts of lands except those enumerated in the statute are abolished, and the trust in question is not among those enumerated (1 R. S. 728, §§ 45, 55). Hitherto there has been a diversity of opinion, and possibly still is, amongst judges, whether the statute abolishing trusts applies or was intended to apply to a trust for a public or charitable purpose, although the preponderance of opinion has always inclined towards a construction giving to the emphatic and comprehensive words of the statute the fullest effect. It has been always supposed, by a majority of the judges that have had occasion to construe the statute, that when the Legislature declared that 'uses and trusts except as authorized and modified in this article are abolished,' the abolition was of all uses and trusts of lands, except those which the statute allowed; and that an express trust, if enumerated in the statute, was valid, but if not, was illegal and void unless capable of execution as a power in trust. On the other hand, it has been thought by some that the article 'of uses and trusts' relates only to private trusts, and that it was not intended to affect charitable uses or public trusts. The words of the statute give no countenance to this view of the question. A charity is a trust, and nothing more—an active, express trust, known to the English law, it is true, distinctively as a *public* trust. It is not to be presumed that the Legislature were unaware of this distinction, or that in authorizing certain express trusts and abolishing all others, trusts for charity were not in the legislative mind."

While the opinion of WRIGHT, J., was the only one delivered in the case and while the judgment pronounced was that of a majority of the court, yet the judges concurred in the judgment on different grounds, and the case, if it stood alone, could hardly be taken as settling the question immediately under consideration; for while DAVIES and PORTER, JJ., concurred in the opinion as a whole, DENIO, C. J., and CAMPBELL, J., dissented generally, and POTTER, J., dissented from so much of it as held the trust void under the laws of New York, while two other judges, DAVIS and BROWN, withheld their opinions upon that question. Subsequent authorities however have established the doctrine enunciated by WRIGHT, J., as the law of the State of New York. In 1866 the question came again before the

Court of Appeals, in *Bascom v. Albertson*, 34 N. Y. 584, and, in 1873, in *Holmes v. Mead*, 52 N. Y. 332; and by these two cases, in the latter of which there was no dissent, it has been finally settled, that if the doctrine of charitable uses ever was in effect in New York, it has been swept away by the Revised Statutes. ALLEN, J., said: "The statute abolishes all uses and trusts, and thus leaves the courts no discretion. All trusts, except those specifically saved, are grouped together and prohibited. The trusts retained are few in number and active trusts for special, temporary purposes in the interest of individuals. They do not include perpetual trusts for charity, or for the benefit of classes or of corporations. It is no answer to say that the statute of uses and trusts relates to private trusts; for that only proves that the Legislature did not intend to permit public and general trusts."*

The doctrines of *Holmes v. Mead* have been adopted in Wisconsin, where the Statute of Uses is the same as that of New York, and the abolition of all trusts not specified was held to extend to charitable trusts in *Dodge et al. v. Williams et al.*, 46 Wisc. 70, in the course of the opinion in which case RYAN, C. J., commenting on the cases of *Ruth v. Oberbrunner*, 40 Wisc. 238, and *Heiss v. Murphey*, Id. 276, said: "There are some passing remarks to be found in *Ruth v. Oberbrunner* and *Heiss v. Murphey* apparently more or less in conflict with what is now held. But these are apparently mere inaccuracies of remark, so common in discussion, not involved in the decision of those cases. No question of charitable use was in either case, and no question of trust in *Heiss v. Murphey*. In *Ruth v. Oberbrunner* the devise was in trust to hold 'for the use and benefit of the Order of S. Dominic and S. Catharine Female Academy,' not corporations. There is no suggestion in the will of any charity. The trust appears to have been private not public. It was a passive trust under which the trustee would take no title; and the trust apparently failed for want of any certain *cestui que trust* to take the legal title under the statute. In *Heiss v. Murphey* the devise was in fee directly to an uncertain and undefined number of persons not capable of being ascertained with certainty—'the Roman Catholic orphans of the diocese of La Crosse;' and the devise failed for want of known certain devisees. The chief justice, having been consulted at the bar in the matter, took no part in *Ruth v. Oberbrunner*, and can speak only

* The fact that the effect of an Act passed in 1830 was not settled until 1873—and then after more than twenty years' active litigation—is a striking commentary upon the position of those advocates of codification who urge that immediately on the passage of a code all the uncertainty of the common law will be done away with—and that the law "will progress much better by legislation than litigation."

from the report. But *Heiss v. Murphey* was certainly decided by the court on the ground just stated."

In Minnesota, also, the New York rule is followed, and the existence of the doctrine of charitable uses is denied, *Little v. Willford*, 31 Minn. 173. In California, on the contrary, *Williams v. Williams* is upheld in spite of its having been overruled in its own State; and in the *Estate of Hinckley*, 58 Cal. 457, the Supreme Court, in a very learned opinion by Mc-KINSTRY, J., sustained the jurisdiction of the courts in cases of charities, independently of the Statute of 43 Eliz. and notwithstanding the Code.

Cy pres.

A charity is sometimes erected in such terms that for some reason, either for vagueness or for illegality as to the method prescribed for its execution, it cannot take effect in the way designed by the testator or founder. In cases of this character, in England, the rule of *cy pres* was and is applied. This rule is to the effect that when a particular charity is named by the testator, which charity cannot, owing to some cause or other, take effect, and there is a general intention in favor of charity, the Court of Chancery will carry out the general charitable intention by the adoption of some other charitable objects not inconsistent with such intention, *Tudor, L. C. in R. P.*, p. 577. This rule, which rests to a great extent upon the power of the crown as *parens patriæ*, has never been adopted in this country, for the reason, amongst others, that no one of our States, and still less the federal government, exercises or possesses the paternal power; for although there may, perhaps, be found a stray dictum or so to the effect that the royal paternal power has become vested in the State, see, for example, a remark in *Griffin v. Graham*, 1 Hawks, 96, yet an examination of the cases will show that there has never been an attempt to exercise the prerogative, and the existence of any such power is universally denied, see *Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299; *Lepage v. McNamara*, 5 Iowa, 124; *Beekman v. Bonsor*, 23 N. Y. 298; *Mitchell v. Presbyterian Church*, 3 Demar. 603; *Attorney-General v. Jolly*, 2 Strob. Eq. 379. While, however, the prerogative *cy pres* power has never been recognized here, yet in some States, and notably in Pennsylvania, there has sprung up a judicial doctrine of *cy pres*, according to which, when a definite and specific charity is indicated, and some of the means by which that particular charity is to be carried into effect cannot be employed or are not sufficiently set forth, the court will enforce the particular charity through proper means. This, it will be seen, is a very different thing from carrying out the "general charitable

intention by the adoption of some other charitable objects not inconsistent with a general charitable intent." The doctrine and its effects are well stated by LOWRIE, J., in the *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9: "4. Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable, but this does not annul the gift. The rule of equity on this subject seems to be clear—that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention, 7 Ves. 69; 4 Id. 329; 14 Simons, 232; 17 S. & R. 91; 1 M. & W. 287.

"5. And this is the doctrine of *cy pres*, so far as it has been expressly adopted by us—not the doctrine 'grossly revolting to the public sense of justice,' 1 Watts, 226, and 'carried to the extravagant length that it was formerly,' 17 S. & R. 93, by which an unlawful or entirely indefinite charity was transformed by the court or the crown into one that was lawful or definite, though not at all intended by the donor or testator, but a reasonable doctrine, by which a well-defined charity may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness. Our jurisprudence furnishes several illustrations of the doctrine thus restricted, 1 Pa. R. 49; 2 W. & S. 81; 10 Barr, 26; 17 S. & R. 91.

"6. The meaning of the doctrine of *cy pres*, as received by us, is, that when a definite function or duty is to be performed and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable, and so, of course, it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence."

This rule is, as will be at once seen, of the most reasonable character; indeed, it has been called only a liberal rule of construction, *Erskine v. Whitehead*, 84 Ind. 367; *Perry on Trusts*, § 727. The doctrine has been recognized in several cases, *Pell v. Mercer*, 14 R. I. 412 (in which case the court alluded to the unreported cases, in the same State, of *Gardiner v. Kingston Academy*; *St. Michael's Church v. Sayles*, May T. 1882; *Attorney-General v. City Council of Newport*, March T. 1882); *Hospital Trust Co. v. Olney*, 14 R. I. 449; and in *Moore's Heirs v. Moore's Devisees*, 4 Dana, 356, ROBERTSON, C. J., states the doctrine and its limitations as follows: "The *cy pres* doctrine of England is not, and should not

be, a judicial doctrine except in one kind of case; and that is where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal or inappropriate or which happens to fail, has been prescribed. In such a case a Court of Equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the *declared* intention of the donor, and not arbitrarily and in the dark, *presuming* on his motives or wishes, declare an object for him, and it may act judicially, as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to specific objects of charity selected by itself, merely because he had dedicated it to charity generally or to a specified purpose which cannot be effectuated; for the court cannot know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and *peculiar* benevolence, has seen fit to decree its appropriation, whereby he, and not the donor, in effect and at last *creates* the charity."

An excellent example of the application of the doctrine to a public grant is found in *Kiefer v. The German-American Seminary*, 46 Mich. 636. In that case, in 1861, the Legislature granted to the defendant lands for educational purposes, with a proviso in the grant that the lands should be used for the *erection* of buildings for the use of the corporation, which gave a bond for the faithful performance of the proviso. The land was sold and a certain amount of money was realized from the sale. In 1864 the defendant was consolidated with another educational association and took, for the joint educational use, buildings, which the latter had already erected, and did not erect new ones. The court held that the defendant had, in effect, complied with the proviso, COOLEY, J., saying: "The general intent of the grant, as has been said, was to aid the incorporation in accomplishing its objects; but the funds realized must be expended in buildings. Buildings would be permanent and could not be wasted, and by requiring their construction the State would guard, as far as was practicable, against its bounty being lost; but suppose the corporators, when the lands were received, had deemed it wise to withhold them from market for a term of years in anticipation of a rise . . . and, by the donations of themselves and their friends, had procured all necessary buildings, would they thereby have lost the benefit of the grant and entitled the State to demand reconveyance? This, we think, is in substance the question now before us.

"A literal and technical construction of the grant would require the very moneys realized from the lands to be applied to the purchase or erection of buildings. But the view consonant with the generosity which

prompted the donation looks beyond technicality and finds the purpose substantially accomplished if the grant has enabled the donee to procure buildings for its purpose, whether exactly in the method contemplated or otherwise. If buildings were procured of a value equal to the fund donated, the condition of the grant would be kept in spirit and it would be beneath the dignity of the State to raise technical objections and demand a forfeiture based upon a failure in literal compliance, under such circumstances. Sovereigns do not deal with the objects of their bounty in that spirit."

On the other hand, there are cases in which the doctrine of even a judicial, distinguished from the prerogative, *cy pres*, has been lost sight of and has been, in effect, repudiated. Thus in *Starkweather v. American Bible Society*, 72 Ill. 50, there was a devise for a readily executable charitable purpose to a New York corporation not authorized by the law of New York to take realty. The court was asked to order a sale of the property, so that, a conversion being worked, the charity might take the bequest as personalty, this the court refused to do, WALKER, J., saying: "The testator no doubt intended to give the land to the appellee, but the means employed failed to accomplish his purpose, but that does not clothe this court with power to give money or other property. . . . Why change the fund from land to money when the testator intended to give land and not money? Why substitute something not donated because something was intended to be donated, but did not vest in the donee?" And the court further held that the doctrine of *cy pres* should be confined to cases where the trust was legal and definite as to the persons to whom the gift was made, and required only a trustee to carry it into effect, and when the trust was within the Statute of 43 Eliz. Again, in *Heiss's Ex'r v. Murphey*, 40 Wisc. 276, there was a devise to the Roman Catholic orphans of the Diocese of La Crosse, and an appointment of the Bishop of that diocese, executor, with power to sell the property and use the proceeds for the benefit of the said orphans; the court refused to sustain the devise as a charitable trust, COLE, J., saying: "There are doubtless cases in which a devise or bequest to a charity as vague and uncertain as the one we are considering has been sustained. But these cases mainly rest upon the doctrine of *cy pres*, which is a doctrine of prerogative or sovereignty and not strictly a judicial power. . . . It is not claimed that the courts of the State are clothed with other than strictly judicial power, or that they have succeeded to the jurisdiction over charities which the Chancellor in England exercises by virtue of the royal prerogative and the *cy pres* power. It is admitted that the intent of the testator is to control in administering charitable trusts. But if that intent has been so vaguely and inaptly ex-

pressed that the *cestui que trust* cannot be ascertained the charity must fail." And see *White v. Fisk*, 22 Conn. 31; *Adye v. Smith*, 44 Id. 60; *Green v. Allen*, 5 Humph. 170; *Lepage v. McNamara*, 5 Iowa, 124; *Bridges v. Pleasant*, 4 Ired. Eq. 26. In the spirit of the doctrine of *cy pres*, effect may be given to an inartificially drawn deed, wherein a plain intent to promote a charity is manifested, *Meeting St. Baptist Society v. Hall*, 8 R. I. 234.

Statutory Recognition of Doctrine of *Cy pres*.

A statutory recognition of the doctrine of *cy pres* may also be found in Pennsylvania and Georgia—in the former State it is enacted that no disposition of property made for any religious, charitable, literary or scientific use shall fail for want of a trustee or by reason of the objects being indefinite, uncertain, or ceasing or depending on the discretion of a lost trustee, or being given in perpetuity or in excess of the annual value allowed by law, but the proper court shall supply a trustee and carry out the intent of the donor so far as the same can be ascertained and carried into effect consistently with law or equity; in cases beyond the powers of the courts the Legislature may regulate and control the gift so far as possible consistently with the intent of the donor, Act April 26, 1855, § 10 P. L. 331; Pur. Dig. vol. 1, p. 250, pl. 22; in the latter State it is enacted that in all cases of charitable or public devises where there is a general intention manifested by the testator to effect a certain purpose and the particular mode in which it is directed to be carried out fails, a Court of Chancery may, by approximation, effect the purpose in a manner most similar to that indicated by the testator, Code, § 2468.

Charity—When too Vague.

We may now consider the decisions bearing upon charitable appropriations, with reference to the question whether they be or be not sufficiently definite; for a common ground of attack upon a charitable devise is its vagueness either as to its subject or objects or method of execution; and first, it is to be borne in mind that in interpreting a devise to a charity every intendment is to be made in favor of the charitable intent of the testator, and if the words employed be ambiguous or contradictory they are, nevertheless, to be so construed as to support the devise, if it can be done without outraging the plain rules of common sense, and a court will feel itself bound to carry the will into effect, if it can be done by legal means and consistently with the rules of law—even if the particular mode or manner of accomplishing the charitable intent pointed out by the testator

be illegal or impracticable, *Bartlet v. King*, 12 Mass. 543; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 117; *Jackson v. Phillips*, 14 Allen, 539.

Discretionary Power in Trustee or Other Person may Prevent Vagueness.

Wherever a discretion is vested in a trustee or other person to select the objects of the charity, whether of a certain specified kind or generally, a charitable devise or dedication which would, otherwise, be void for vagueness, may be upheld, *Witman v. Lex*, 17 S. & R. 88; *McLain v. School Directors of White Township*, 51 Pa. St. 196; *Pickering v. Shotwell*, 10 Id. 23; *Power v. Cassidy*, 79 N. Y. 602; *Gumble v. Pfluger*, 62 How. Pr. 118. As said by STRONG, J.: "The general rule may be stated thus: In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the object of the testator's bounty may be, provided there is a power vested in some one over its application to those objects," *Domestic and Foreign Missionary Society's Appeal*, 30 Pa. St. 425; this rule is not confined to wills, but has been applied in cases of charity created by agreements *inter vivos*, *Beaver v. Filson*, 8 Pa. St. 327. And it is held that where a trustee is appointed and no rule or order of selection is prescribed by the testator or founder, a power of selection vests by implication in the trustee, *Re Taylor's Orphans' Asylum*, 36 Wisc. 534; *Dodge et al. v. Williams*, 46 Id. 70; but it seems that a will may be so drawn as to refuse all discretion to the trustee, in which case, if the charity be too vague otherwise, it cannot be saved by a presumed intention to vest a power of selection: thus, in *Fairfield v. Lawson*, 50 Conn. 501, there was a devise "in trust . . . for the education of the freedman . . . the income to be paid to the pauper officers of the Freedman's Association." No Freedman's Association was in existence, though there were several societies having for their object the education of the emancipated blacks, the court held the devise void for vagueness, and that the trustees could not appropriate the fund, for all discretion was taken from them by the direction to pay over. See, also, *Grimes v. Harmon*, 35 Ind. 198. The depositary of the discretion may be an unincorporated association, *Pickering v. Shotwell*, 10 Pa. St. 23; but it cannot be vested in a body entirely nonexistent either as a corporation or an unincorporated association, *Zeissweiss v. James*, 63 Pa. St. 465.

Discretion must be confined to Charitable as distinguished from Benevolent Purposes.

The discretionary power of selection must be confined within strictly charitable limits, and, therefore, where the depositary of the power is given

discretion to apply the bequest to works of charity or benevolence, as he may see fit, the bequest will be void, for benevolence, as we have seen, is a word of greater extent in the law than charity, *Thomson's Executor v. Norris*, 20 N. J. Eq. 489, and see *Chamberlain v. Stearns*, 111 Mass. 267; but there are instances in which the courts, in their desire to sustain a will, have translated benevolent to mean charitable, thus in *Goodale v. Money*, 60 N. H. 528, the testator made devises to certain charities by name, and in the thirty-fourth clause of the will said: "I place the remainder of my property in the hands of my executors to be distributed by them, after my decease, among my relatives and for benevolent objects, in such sums as, in their judgment, shall be for the best," the court held the word benevolent equivalent to charitable, SMITH, J., saying: "In this case, there is nothing in the thirty-fourth clause of the will which indicates that the testator did not intend by the word 'benevolent' objects which are technically known as 'charitable.' . . . It may be said that it is quite probable the testator did not know there is any legal difference between the words charitable and benevolent. Most persons probably use the words indifferently and as meaning the same thing. If it had occurred to the testator to look in the dictionary he would have found the words classed as synonymous." In addition to this negative, and, it must be confessed, rather strained, argument the court relied on the fact that the specific bequests were to charities proper. *Pell v. Mercer*, 14 R. I. 412, is a better example; in that case, DURFEE, C. J., in delivering the opinion of the court, said: "In the case at bar the objection is that the bequest is to such works of religion or benevolence as the executors may select, and that consistently with the bequest the entire fund may be applied to works of benevolence which are not works of charity. . . . We think it is well established by the clear current of authority that if the word 'benevolent' be used in its larger meaning, the bequest cannot be sustained; the fact that the bequest is in the alternative 'to works of religion or benevolence' being immaterial, inasmuch as the legacy being in the alternative, it is in the power of the executors to apply the property wholly to works of benevolence, and among such works, to works which are not technically charitable, *Morice v. The Bishop of Durham*, 9 Ves. Jr. 399, 403; *James v. Allen*, 3 Meriv. 17; *Mitford v. Reynolds*, 1 Ph. 185, 190; *Ellis v. Selby*, 1 Myl. & Cr. 286; *Williams v. Williams*, 5 L. J. N. S. Eq. 84; *Nash v. Morley*, 5 Beav. 177; *Kendall v. Granger*, Id. 300; *In re Jarman's Est.*, L. R. 8 Ch. Div. 584; Boyle on Char. 281. It does not follow, however, that the bequest is invalid because the word 'benevolent' is used, for the question is a question not of language but of meaning, and it may appear by the context of the will or by the will taken as a whole,

that, though the word benevolent was used, the only thing which was intended to be denoted by it was charity. If it be clear that this was the meaning the will must be executed in accordance with it, *Suter v. Hilliard*, 132 Mass. 412; *Rotch v. Emerson*, 105 Id. 431; *Saltonstall v. Sanders*, 11 Allen, 446; *Morice v. The Bishop of Durham*, 10 Ves. Jr. 522, 542; *Whicker v. Hume*, 7 H. L. C. 124; *De Camp v. Dobbins*, 29 N. J. Eq. 36; Boyle on Char. 286. . . . We have seen that the testator, by the first section of his will, appoints the executors and expresses a hope that they will be content with \$1000 each for their services, giving as a reason that he regards the execution of his will ‘as a work of charity as well as of friendship.’ There is reason to think that these two words ‘friendship’ and ‘charity’ are the two keys, so to speak, which fully unlock the meaning of every part of the will. The will is a will of friendship in so far as it contains bequests and directions in favor of particular persons; for the rest it is a will and testament of charity.” The learned Chief Justice then considered other expressions in the will which spoke of gifts for “public purposes,” “public benefactions,” a recommendation of the boards of missions as “a proper object for the whole or a part” of the property left to the executors “for religious or benevolent purposes,” and the sentence “It is my earnest desire that . . . my property may go in the most prudent, economical, and effectual manner to the permanent good benefit of men, in case of the bequest to public objects, and in case of the bequest to person, to their comfort and happiness,” and, from thence deducing a general intent, held that the word benevolent had been used by the testator in the sense of charitable. *Erskine v. Whitehead*, 84 Ind. 357, is another case in which the testator was held to have so explained the use made by him of the word benevolent as to constitute the bequest one to a charity. In that case the bequest was to form a county “benevolent fund for poor families, widows, orphans, new-comers in distress or persons in Vanderburgh County suffering from want of food, clothing or fuel, especially in the winter,” and see *Suter v. Hilliard*, 132 Mass. 412.

A definite charitable character may be impressed upon an otherwise vague devise by the character of the trustee, where the trustee is a religious or charitable organization or society, the testator or donor being presumed to have been familiar with the object of the society, and to have intended that his bounty should be appropriated thereto, *Carter v. Balfour*, 19 Ala. 814, and a purpose of the bequest or devise need not, in such case, be set out, *Evangelical Association's Appeal*, 35 Pa. St. 316, and a devise to the treasurer of a charity, in his official capacity, for the sole behoof of the charity, has been upheld, *Beall v. Surviving Executors of Fox*, 4 Ga. 404; *Executors of Burr v. Smith et al.*, 7 Vt. 243.

Devise to Unincorporated Charitable Association.

In those States in which the doctrine of charitable uses obtains, devises may be made to unincorporated charitable societies, *Zimmerman v. Anders*, 6 W. & S. 218; *Gibson v. McCall*, 1 Rich. L. 174; even without naming of trustee, as said in *Carter v. Balfour*, 19 Ala. 814: "In making the gifts to the societies by their names, I think it is clearly and necessarily inferrible that the gifts were intended to be made to them in their aggregate capacity and for the purposes for which they were organized, and that the testator could not have intended gifts to the individual members of the society, or he would have made the bequests to them by their individual names, in the ordinary way;" and see *Johnson v. Mayne*, 4 Iowa, 180; *Bartlett v. Nye*, 4 Metc. 378; *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoff. 207; *King v. Woodhull*, 3 Edw. Ch. 79 (these last two cases were decided before the doctrine of charitable uses had been declared non-existent in New York). In the *Methodist Church v. Remington*, 1 Watts, 219, the Supreme Court of Pennsylvania confined the validity of a trust in favor of an unincorporated charity to cases in which all the members were residents of the Commonwealth, and, consequently, held a devise in trust for the Methodist Church in the United States void; but in *Thompson v. Swoope*, 24 Pa. St. 474, a trust for non-resident religious corporations was upheld, and the court, in its opinion delivered by LOWRIE, J., restricted the effect of the decision in the Remington case, saying: "In the *Methodist Church v. Remington*, 1 Watts, 218, there was an expression of opinion that would seem to negative this question; but the case related to property conveyed in trust for a church or meeting-house, and perhaps the expression ought to have been so limited;" and, after citing *Spear v. Bruce*, argued at September Term, 1843, and *Patterson v. Espy*, decided at the same time—both cases unreported—continuing: "In one of these cases an unincorporated association not at all limited by State lines and in the other a corporation created by another State and doing its business there, were held capable of taking a title by devise for charitable uses, and thus the influence of the adverse opinion incidentally expressed in the *Methodist Church v. Remington* is entirely destroyed;" and see *Evangelical Association's Appeal*, 35 Pa. St. 316; and in *Wright v. The Trustees of the Methodist Church*, 1 Hoff. 207, a devise to a voluntary unincorporated society, composed of members in Vermont, New York, Massachusetts and Upper Canada, and known as the Yearly Meeting of Friends in New York, was upheld.

Devise to a Charity requiring a Future Corporation to put it into Effect.

A devise to a charity may be good, although it require a future corporation to carry it into effect, when it appears from the will that the erection of such corporation was within the contemplation of the testator, *Goodell v. Union Association*, 29 N. J. Eq. 32; *Ould v. Washington Hospital*, 5 Otto, 303; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Trustees of Cory Universalist Society v. Beatty*, 28 N. J. Eq. 575; *Gould v. Taylor's Orphan Asylum*, 46 Wisc. 106; *Coit v. Comstock*, 51 Conn. 352; but a void bequest to an unincorporated body will not be rendered good by an incorporation effected subsequently to a testator's death, and which is not contemplated in the will, *Owens v. Missionary Society*, 14 N. Y. 380; *Miller v. Porter*, 53 Pa. St. 292.

Corporation as Trustee.

A corporation may be a trustee of a charity if not prohibited to act as such either by general statute or the peculiar law of its own existence, *Vidal v. Girard's Executors*, 2 How. 127; *Perin v. Carey*, 24 Id. 467; *McDonogh's Executors v. Murdoch*, 15 Id. 367; *American Colonization Society v. Gartrell*, 23 Ga. 448; and a devise may be made to a charitable association upon terms slightly variant from the usual course of the administration thereof, if not so repugnant as to defeat any of the intentions of the original founders, *Silcox et ux. v. Harper et al.*, 32 Ga. 639. In *Jones v. Habersham*, 3 Woods, 443, BRADLEY, J., intimated that a qualification of the capacity of the corporation to act as trustee might be found in the requirement "that the object of the trust be germane to or in harmony with the objects of the corporation." In *Chapin v. School District No. 2*, 35 N. H. 445, the test was said to be the absence of repugnancy to the object of the corporation; and this we think to be the proper rule.

In the *Mayor and Corporation of Philadelphia v. Elliott*, 3 Rawle, 170, it was held that a municipality might act as trustee for a charity whose objects would fall within its general duties—in that case for a hospital for the indigent lame and blind; and the like has been held where the trust was for educational purposes, although the charity was not confined to the residents within the municipal bounds, a preference only was given to such residents, *Vidal's Case, supra*. A county has been held to be a good trustee to distribute charity to the orphan poor, *Board of Commissioners of Lagrange County v. Rogers*, 55 Ind. 297; but in New Jersey it has been held that townships are not proper trustees of a charity for

educating poor orphan children, *Mason's Executor v. Trustees of Methodist Episcopal Church*, 27 N. J. Eq. 47.

One charity may hold property in trust for another, *Jones v. Habersham*, *supra*.

Trustee supplied by Court.

Where no trustee is appointed, or where a person or corporation incompetent to act as trustee is designated as such by a testator or founder, the court, in a proper case, will supply the deficiency, *Shotwell v. Mott*, 2 Sand. Ch. 46; *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; *Williams v. Pearson*, 38 Ala. 299; or the property devised may be charged with the trust in the hands of the heirs, *Johnson v. Mayne*, 4 Iowa, 180; *Byers v. McCartney*, 62 Id. 339; *Bartlett v. Nye*, 4 Metc. 378; *Fuller's Executor v. Griffin*, 3 Vt. 400; the rule being frequently stated to be, in general, that equity will not suffer a charitable trust to fail for want of a trustee, *McGirr v. Aaron*, 1 P. & W. 49. This rule, we have seen, is recognized by statute in Pennsylvania, Act of 1855, and Georgia, Code, § 2468, *supra*, p. 371.

Instances of Charities held not too Vague.

The following devises have been sustained as not too vague: To an unincorporated body for the poor of the society, *Zimmerman v. Anders*, 6 W. & S. 218; to the poor of certain churches, *Yard's Appeal*, 64 Pa. St. 95; for the colored children of a certain State, *Craig v. Secrist*, 54 Ind. 419; "for such poor white citizens of Kent County who, by timely assistance, might be kept from the poor-house," *Griffith v. State*, 2 Del. Ch. 421; S. C., Id. 392; to the poor of certain specified districts, *Williams v. Pearson*, 38 Ala. 298; *Hornberger v. Hornberger*, 12 Heisk. 635; *State v. Gerard*, 2 Ired. Eq. 210; *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Id. 115; *Board of Commissioners of Lagrange County v. Rogers*, 55 Ind. 297; *Urmey's Ex'rs v. Wooden*, 1 Oh. St. 160; for a school for a neighborhood, *Martin v. McCord*, 5 Watts, 493; for the education of the poor children of a county, *Franklin v. Armfield*, 2 Snead, 305; *Newson v. Starke*, 46 Ga. St. 88 (overruling *Beall v. Drane*, 25 Id. 430); for "the scholars of poor people," *Clement v. Hyde*, 50 Vt. 716 (in this case there was no express creation of a power of selection, and the court held that "scholars" meant poor children with an aptitude for learning, and that the fund might be applied to their support, board, etc., as well as directly to their tuition); to the education of colored children in the State of Indiana, *Lindley's Case*, 32 Ind. 367; "for the distribution of good

books among poor people in the back part of Pennsylvania or to the support of an institution or free school in or near Philadelphia," *Pickering v. Shotwell*, 10 Pa. St. 23; "in trust for the cause of peace, to be paid over to the executive committee of the American Peace Society," *Tappan v. Deblois*, 45 Me. 123; "to the cause of Christ," *Going v. Emery*, 16 Pick. 107; to the suffering poor of the town of Auburn, *Howard v. American Peace Society*, 49 Me. 288; to ——, of Boston, "to apply the same to the relief of the destitute, in such manner as charity is usually distributed by the ministers at large in the city of Boston," *Derby v. Derby*, 4 R. I. 414; to a home to be founded, the object being thus described, "the purpose . . . is the founding a home for aged, respectable, indigent women who have been residents of the city of New London, under such regulations as may be provided by such act of incorporation," *Coit v. Comstock*, 51 Conn. 352; to trustees, for the promotion of education and science among Indian and African youth, a power of selection being given to the trustees, *Treat's Appeal*, 30 Conn. 113; "for educating some poor apprentices for this county, to be selected by the city court," *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354-369; "to found a free school for orphans or the children of poor parents who, in the judgment of my trustees, are best entitled to the donation," *Griffin v. Graham*, 1 Hawks, 96; to one of two specified charities, "which ever may be deemed best," *Fairbanks v. Lamson*, 99 Mass. 533; to advance the Christian religion, a discretion being lodged in the executor, *Miller v. Teachout*, 24 Oh. St. 525; for the education "of the freedmen of the nation," *McAllister v. McAllister*, 46 Vt. 272; for the sole relief and benefit of poor widows of irreproachable character who have resided not under three years within eight miles of the town of W., and who have no certain income, *De Bruler v. Ferguson*, 54 Ind. 549; for the comfort, relief and welfare of the poor and distressed within the neighborhood of P., *Deering v. Adams*, 37 Me. 264; to deserving relatives and such indigent persons as the executors may think worthy of the same, and in such manner as they may think proper, *Drew v. Wakefield*, 54 Me. 291; to the committee or school society in the town of R., for the use and benefit of such families in said society in their schooling as shall not exceed in the list of the town for the year the sum of \$50, *Birchard v. Scott*, 39 Conn. 63; to purchase fuel to be given or sold at low prices, as may be deemed best by the trustees, to such worthy and industrious persons as are not supported in whole or in part at the public expense, *Webb v. Neal*, 5 Allen, 575; to provide and sustain a home for respectable, destitute, aged, native-born American men and women, *Odell v. Odell*, 10 Allen, 1; to provide groceries for the sick and infirm and clothing and fuel for the helpless and needy, *Washburn v. Sewall*, 9 Metc. 280; in trust for the poor orphans of a State, a power of

selection being provided for, *Miller v. Atkinson*, 63 N. C. 537; to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessaries, *Grandom's Estate*, 6 W & S. 537; to apply interest for ten years to the support of the poor of N. township, then to keep the principal for the use of the county, *The County of Lawrence et al. v. Leonard*, 83 Pa. St. 206; for the education and tuition of worthy, indigent females, *Dodge v. Williams*, 46 Wisc. 70, 106; for the education and instruction of poor and needy children in B., and to furnish them with necessary clothing while attending school, *Swasey v. American Bible Society*, 57 Me. 523; for an asylum for destitute orphan boys and girls at M.. *Milne v. Milne*, 17 La. 46.

Instances of Devises held Vague.

On the other hand, there are to be found decisions holding charitable devises void on account of vagueness. In *Lepage v. McNamara*, 5 Iowa, 124, the devise was to a bishop or his successors, "to dispose of said real estate and apply so much thereof to the church, or to the education and maintenance of poor children as he, in his wisdom, should think proper and legal," the court held the devise void for uncertainty, (1) as to what church was intended, (2) as to what poor children should receive the benefits of the charity, (3) as to whether the devise should be applied to the one or the other object, (4) as to how much should be applied to either or each, (5) as to how the bishop was to administer the trust, in his official or in his individual capacity. It is to be noted that *Lepage v. McNamara* was a case at law, and in view of the later decisions in Iowa, it is doubtful whether, if the case were now to arise, it would be so decided.

In *Hughes v. Daly*, 49 Conn. 34, there was a gift "towards the building of a boys' reformatory, if such an institution should be established, for the Catholic boys of the State, under the direction of Bishop Galberry, or his successor . . . the residue to the Rt. Rev. Bishop Galberry, or his successor, for a Catholic reformatory for boys in this State of Connecticut." The court held the devise too vague, PARDEE, J., saying: "reformatory used as a noun is of too wide and uncertain significance to support the bequest. It includes all institutions and places in which efforts are made either to cultivate the intellect, instruct the conscience, or improve the conduct, places in which persons voluntarily assemble, receive instruction and submit to discipline, or are detained therein for either of these purposes by force . . . on no one is conferred power to declare the precise purpose, organization, etc., or to select the boys, omissions which it is not within the province of the court to supply." It is thought that this

case is open to criticism—the word “reformatory” applying to it any one of the definitions given by the learned judge, embraces within it the idea of a legal charity, and, in view of the fact that the same court in *Coit v. Comstock*, 51 Conn. 352, held “home” to be sufficiently descriptive of a charity for whose establishment the will provided, it seems that in “reformatory” might have been discovered a definite meaning; and the application of a not over-liberal rule of interpretation would have enabled the court to discover a power of selection lodged in the bishop. In *White v. Fisk*, 22 Conn. 31, a bequest to trustees for the support of indigent and pious young men preparing for the ministry in New Haven, was held void; and so in *Bridges v. Pleasants*, 4 Ired. Eq. 26, a devise “to be applied to home missions.”

The rule of vagueness applies where the vagueness arises from the indefiniteness with which in its charter or articles of association the objects of a society or corporation, to which a gift has been made without a specially expressed trust, are set forth; in such case, when the objects are too vague, the devise fails, as in *Owens v. Missionary Society*, 14 N. Y. 380, where the devise, held void, was to a society whose object was “to diffuse more generally the benefits of education, civilization, and Christianity throughout the United States and elsewhere.”

The above cited cases are all from States in which the doctrine of charitable uses is or has been, to an extent at least, recognized. In States where it has been repudiated we find declared void, on account of the indefiniteness as to beneficiaries: a devise to trustees “for feeding, clothing, and educating the poor children belonging to the congregation of St. Peter's P. E. Church, in the City of Baltimore,” *Dashiell v. Attorney-General*, 5 H. & J. 392, and see *Dashiell v. Attorney-General*, 6 Id. 1; a devise “to the real distressed poor of Talbot County,” *Trippe v. Frazier and wife*, 4 Id. 446; a devise “to the Mayor and City of Baltimore, to be applied, under the direction of said corporation, to the relief and support of the indigent and necessitous poor persons who may from time to time reside within the limits, as now known, of the Twelfth Ward of the City of Baltimore,” *Wilderman v. Mayor and City Councils of Baltimore*, 8 Md. 551; of a fund in the hands of the executor to be by him applied to the support of missionaries in India, “the same to be applied under the direction of the General Associations Board of Missions of the Presbyterian Church in the United States,” *Presbyterian Church v. White's Administrators*, 4 Am. Law Reg. 526; to the Educational Society of Virginia for the benefit of theological students at the Protestant Episcopal Seminary near Alexandria, in the District of Columbia, *Meade v. Beale*, Taney, C. C. Dec. 339; to trustees to permit all and every person “belonging to the

Roman Catholic Church . . . and residing in Richmond at the time of the testator's death to build a church on the lot for the use of themselves and all others of that religion who may hereafter reside in Richmond," *Gallago's Executor v. Attorney-General*, 3 Leigh, 450; to certain persons in trust "for such purposes as they consider promise to be most beneficial to the town and trade of Alexandria," *Wheeler v. Smith*, 9 How. 55; for the education of free colored persons in Baltimore City, *Needles v. Martin*, 33 Md. 609; a devise for a perpetual loan fund of a charity, the loan "to be set aside to certain necessitous churches of the Methodist Episcopal Church, to be selected by a committee of the Church Extension Society," *Church Extension of the Methodist Episcopal Church v. Smith*, 56 Md. 362; "to the trustees of the Mary Hoye School House for educational purposes, and to the African Missionary Society (neither body being incorporated) for the purpose of converting and Christianizing the African race," *Rizer v. Perry*, 58 Md. 112.

Devise for Illegal though Philanthropic Purpose not Sustainable as a Charity.

While, as we have seen, means which have been prescribed by a testator or founder to carry out a legal charitable purpose are illegal, equity will, in a proper case, substitute legal means for those prescribed, and so enforce the intention of the bequest or foundation, yet a devise to a purpose which is illegal or against public policy can never be sustained as a charity; thus in *Haywood v. Craven's Executor*, 2 Car. Law Repos. 557, a devise of negroes to be set free, in a way other than the method provided by the law for the emancipation of slaves, was held void; and in *Jackson v. Phillips*, 14 Allen, 539, a devise to secure the amendment of the law so that women might enjoy the same civil rights as men was held void, GRAY, J., saying: "This bequest differs from the others in aiming directly and exclusively to change the laws, and its object cannot be accomplished without changing the Constitution. . . . Our duty is limited to expounding the laws as they stand, and those laws do not recognize the purpose of overthrowing or changing them in whole or in part as a charitable use."

Rule against Perpetuities as applied to Charities.

The subject of the application of the rule against perpetuities to charities is one of considerable interest. It naturally divides itself into two divisions, which have sometimes been confused, and give rise to two questions; first, can land be dedicated *in perpetuam* and with a restriction upon its alienation to a corporation or other trustee for a charitable use?

Second, does the rule of perpetuities, which requires an absolute vesting within a certain period, apply in the case of charities, or are they exempt from its operation?

As to the first head it may be considered as settled that a devise *in perpetuum* to a charity is good, *Perin v. Carey*, 24 How. 107; *Williams v. Williams*, 8 N. Y. 535; *State v. Gerard*, 2 Ired. Eq. 210; *Curling v. Curling*, 8 Dana, 38; *Jackson v. Phillips*, 14 Allen, 539; *City of Richmond v. Davis*, 103 Ind. 449; and also that a devise or gift to a charity containing the provision or condition that the property shall never be aliened, sold or disposed of will be sustained, *Jones v. Habersham*, 3 Woods, 443; *Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; *Franklin v. Armfield*, 2 Sneed, 305; *Tharp v. Fleming*, 1 Houst. 580; *Yard's Appeal*, 64 Pa. St. 95; *Perin v. Carey*, *supra*; and in this sense must be understood many of the cases which declare that the statute or rule against perpetuities does not apply to charitable uses, see *Griffith v. State*, 2 Del. Ch. 421; *Goode v. McPherson*, 51 Mo. 126; *Griffin v. Graham*, 1 Hawks, 96; *Town of Hamden v. Rice*, 24 Conn. 350; *Paschal v. Acklin*, 27 Tex. 173; *Grissom v. Hill*, 17 Ark. 488; and, even in States where it is expressly held that the statute of perpetuities is as applicable to a charity as to a private gift, it is said that a vested gift to a charity capable of taking is not a perpetuity, *Levy v. Levy*, 33 N. Y. 97. In Connecticut, it is expressly enacted that lands given for any public or charitable use shall forever remain to the uses for which they are granted, Laws Conn. Tit. 29, Ch. 1, § 3. In California, an eleemosynary devise or dedication is exempted from the rule against perpetuities. See Constit. 1879, Art. XX. § 9; *Estate of Hinckley*, 58 Cal. 457.

This general rule is founded in reason, for the presumption always is that when a gift is made to a charity it is intended to be forever applied to that purpose, and no injury is worked to the public, for in a proper case, even where the deed or will contains a condition against alienation, relief can be had from the Legislature or in Chancery, which, when such action becomes necessary or desirable, in order to carry out the original trust, may authorize the sale of the land. This was decided in *Stanley v. Colt*, 5 Wall. 119, where there was a devise to a "charity, provided that the said real estate be not ever hereafter sold or disposed of," NELSON, J., said: "In England and in this country, where a court of Chancery exists, a charity of the description in question is a peculiar subject of the jurisdiction of the court. . . . So, if lapse of time, or changes as to the condition of the property and of the circumstances attending it have made it prudent, and beneficial to the charity to alien the lands and vest the proceeds in other funds or in a different manner, it is competent for this court to direct such sale and

investment, taking care that no diversion of the gift be permitted. . . . This power in the State of Connecticut, it appears, is exercised by its legislature, as in the present instance. Many acts of the kind have been referred to in the argument extending through a long series of years down to the present time. We cannot doubt that the power exists in the legislature, and it is not for this court to revise the facts upon which it has seen fit to exercise it." And see *Jones v. Habersham, supra*; *Perin v. Carey*, 24 How. 465; *Dodge v. Williams*, 46 Wisc. 70; *Brown v. Meeting St. Baptist Society*, 9 R. I. 177; *Burton's Appeal*, 57 Pa. St. 213. In *Tharp v. Fleming*, 1 Houst. 580, it is denied that such power exists even in the Legislature, or any where to order or permit a sale of realty devised *in perpetuum* for a charitable use, and the application of the proceeds in lieu of the land to the specified use. This case is believed to be the only one in this country which so holds. See Gray on The Rule against Perpetuities, § 590, note 3.

There are, however, cases in which it is held that a provision against alienation in the instrument creating a charitable trust will render the trust void, where under such circumstances an ordinary trust would be so considered. It was so decided in the *Methodist Church v. Clark*, 41 Mich. 730, where the trust restraining alienation for more than two lives, in contravention of Rev. St. §§ 4082, 4081 and 4124, was held not saved by the fact that it was for a charity, and in *White v. Hale*, 2 Coldw. 77, the court refused to execute a trust which directed that the land devised should never be sold and that the rents should be applied to a specified charitable use forever.

As to the second head, the rule, in New York and certain other States, has been authoritatively declared to be that if the land be not vested in a corporation for charitable uses within the period allowed for vesting in ordinary cases, the devise or dedication is void. In *Wetmore v. Parker*, 52 N.Y. 450, CHURCH, C. J., said: "Our statutes against perpetuities relate to *expectant* estates and limitations of *future* contingent interests in personal estates and future estates in lands. The mortmain policy of this State is very simple, and is contained in each charter creating a charitable corporation. The amount of property which it may take and hold in mortmain is restricted, but its ownership is absolute and only qualified by its artificial nature. There is nothing contingent about it—it is fixed and certain; there is nothing *expectant* or *future* about it, but its interest is immediate and vested. A contingent future interest might be limited to such a corporation, and the law of perpetuity would apply until the contingency happened; and if that period was not dependent upon two lives in being, it would be invalid; but if within that period the interest would become vested—the

law against perpetuities would cease." Accordingly, in *Rose v. Rose*, 4 Abb. App. 108, a bequest of realty and personality made, to a beneficial society, if a charitable fund were raised within five years, was held void; and so in *Philip's Executor v. Pond*, 23 N. Y. 69, a bequest for a charitable use which might never arise was held void. And in *Jocelyn v. Nott*, 44 Conn. 55, a devise to trustees to convey to a Congregational church, if any should be organized and should desire to build on the devised land, was held void as tending to create a perpetuity, there being no provision for the time within which the church should be organized and desire the land. And even express exceptions, contained in the statutes announcing the rule against perpetuities, have been strictly construed; thus in Wisconsin, by the Revised Statutes, §§ 2038, 2039, the suspension of the power of alienation for more than two lives in being is prohibited "except where real estate is given or devised to literary or charitable corporations which shall have been organized under the laws of this State for their sole use and benefit." Land was devised to be held in trust for twenty years, for the benefit of certain religious societies; it was held that this was an attempt to create an illegal perpetuity, and that religious societies did not fall within the exception, *De Wolf v. Lawson*, 61 Wisc. 469. On the other hand, we have many cases where the uncertainty of the vesting, either in a trustee or in a charitable corporation, within the time of the rule against perpetuities, has not been given the effect of avoiding the devise or gift. Of this class are all the cases in which equity has refused to allow a charity to fail for want of a trustee and in which devises to future corporations have been sustained; and see, also, *Sohier v. Burr*, 127 Mass. 221; *Russell v. Allen*, 107 U. S. 163; *Sanderson v. White*, 18 Pick. 328; *Heuser v. Harris*, 42 Ill. 425; *Schmidt v. Hess*, 60 Mo. 591; *Cromie v. Louisville Orphans' Home Society*, 3 Bush, 365; *Miller v. Chittenden*, 2 Iowa, 315; 4 Id. 252; *Byers v. McCartney*, 62 Id. 339.

In Virginia a gift made, in trust for a charity, to a corporation in existence but having no power to take the gift, has been upheld on the ground that the Legislature might, within the period required by the rule against perpetuities for vesting, pass an Act enabling the corporation to take, *Literary Fund v. Dawson*, 1 Rob. 402; this, as is remarked by Prof. Gray, "imports into the will as a condition precedent to the gift that the Legislature shall act within a reasonable time, and imputes to the testator the intention that if it does not act within such reasonable time the charitable gift shall be void. Surely a somewhat violent implication," Gray on The Rule against Perpetuities, § 618. The same rule seems to be followed in North Carolina, *Bridges v. Pleasants*, 4 Ired. Eq. 26.

Distinction between a Gift on Condition that it be applied to a Charity and a Trust for a Charity.

A distinction is to be taken between a gift on condition that it be applied to a charity, and a trust for a charity; for in the first case the grantor or his representatives may enter for condition broken, *Barr v. Weld*, 24 Pa. St. 84, while in the second, if the subject of the trust be misapplied or allowed to remain idle, resort must be had to equity for the appointment of a new trustee or to compel the execution of the trust, *Id.*; and non-user will not forfeit the trust where there is no condition, *Wright v. Linn*, 9 Pa. St. 433; *Goode v. McPherson*, 51 Mo. 126.

Restrictive Statutes.

From an early date the policy of the English law was to restrain gifts to charities, which, at the time the policy originated, were held and administered almost exclusively by religious houses. We find as early as 9 Hen. III. that by the statute of that year, Ch. 36, gifts to religious houses were declared void and were forfeited to the lord; by Statute 7 Ed. I. all gifts in mortmain were prohibited. As these statutes were evaded by feigned recoveries, an act, 13 Ed. I., was passed to destroy the effect of these recoveries. A new evasion springing up, through the instrumentality of a use, an act was passed, 15 Rich. II., which extended to uses, and brought within the purview of mortmain legislation all "guilds, fraternities, towns and cities which have perfect community and all others who have offices perpetual though not people of religion." The Act 23 Hen. VIII. Ch. 10, prohibited conveyances to bodies, not corporate, for the use of churches and certain other purposes, but expressly saved the right of devising in mortmain by the custom of cities and incorporated towns. From the Statute of Wills, 34 & 35 Hen. VIII., devises to corporations were expressly excepted. The effect of the Statute 43 Eliz., although it contained no clause of repeal or *non obstante statuto*, was held to be to repeal the foregoing Statutes of Mortmain and the exception in the Statute of Wills, in all cases embraced within the provisions of the Statute of Elizabeth or which could be brought within the same by the most liberal and benign construction. See the learned opinion of BALDWIN, J., in *Magill v. Brown*, Bright. 346. In 1736 was passed the Act 9 Geo. II. Ch. 36, which has served as a model, in some respects, for similar legislation in some of the United States. This Act provided (§ 1) that from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for

money, or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, should be given, released or anyways conveyed or settled to or upon any person, body politic, or otherwise for any estate or interest whatsoever or anyways charged or incumbered by any person or persons whatsoever in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment or settlement of any such lands, tenements, or hereditaments or personal estate (other than stocks in the public funds) were made by deed or indenture, sealed and delivered in the presence of two witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and were enrolled in the Court of Chancery within six calendar months after the execution thereof; and unless such stocks were transferred on the public books six months at least before the death of the grantor or donor, and unless the gift were made to take effect in possession for the charitable use immediately on the making thereof and were without power of revocation, reservation, trust, condition, limitation, clause or agreement for the benefit of the grantor or donor or any one claiming under him; (§ 2) that the foregoing should not extend to any *bona fide* purchase for a full and valuable consideration actually paid at or before the making of conveyance or transfer, without fraud or collusion; (§ 3) that all gifts, etc., for charitable uses, made in any other manner and form than that set forth in § 1, should be null and void; (§ 4) that the Act should not extend to dispositions in favor of the two universities or of any of the colleges or houses within them, or gifts to Eton, Winchester or Westminster for the better support of the scholars upon their foundations. Section 5th limited the capacity of certain colleges to receive additional advowsons; and by section 6th it was declared that the statute did not extend to estates, real or personal, lying or being within Scotland.

This Act has generally been declared not in force in the United States, see *Beall v. Surviving Executors of Fox*, 4 Ga. 404; *King v. Woodhull*, 3 Edw. Ch. 79; *Potter v. Thornton*, 7 R. I. 252; *Perin v. Carey*, 24 How. 465; *Schmucker v. Reel*, 61 Mo. 592; *Leazure v. Hillegas*, 7 S. & R. 321; *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; and in *Dodge v. Williams*, 46 Wisc. 70, RYAN, C. J., in the course of a learned opinion, showed that the reasons which led to the passage of the Act (which, it will be observed, is confined in its effect to land and personal property *to be laid out in land*) in England would not justify or sustain its adoption in this country, saying: "When this State was part of a vast wilderness and all property, real and personal, was in the Indian tribes or in the

British crown, the Statute of Mortmain was not merely inapplicable but had no possible office to fulfil."

While the Statute of Geo. II. may be said never to have been recognized in the United States, except in Delaware where it has been negatively recognized by a decision that it does not apply to a general charitable devise, *State v. Bates*, 2 Harring. 18; and see *Griffith v. State*, 2 Del. Ch. 421; yet in many of the United States statutory restrictions have been placed upon devises to charities. A brief review of some of the legislation upon this head, and the course of decision thereunder, may be useful.

In New York, where, as we have seen, the whole system of charity is based upon corporate agency, it is enacted that no devise to a corporation shall be valid unless it be expressly authorized by its charter or by statute to take by devise. Under this statute it has been held that the prohibition extends to the devise of any estate or interest in realty, which is descendible to heirs, as well as to the land itself, *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoff. 202; and that permission, given in a charter, to purchase land does not confer a right to take by devise, purchase being used in its popular and not in its technical sense, Ib.; *McCartee v. Orphan Asylum*, 9 Cow. 437. As a result of this doctrine a devise of land to the United States to be devoted to the discharge of the national debt has been held void, *United States v. Fox*, 94 U. S. 315, affirming 52 N. Y. 530. A statutory right to hold will not be extended so as to give a right to take by devise, *Jackson ex d. Smith v. Hammond*, 2 Caines's Cas. 337. By the Act of 1848, Ch. 319, corporations created thereunder are restricted to an income of ten thousand dollars per annum, and all gifts to such corporations to be valid are required to have been made or devised two months before the donor's death; and where the devisor leaves a wife, child or parent, the devise cannot exceed one-quarter of the estate left after payment of his debts. In *Stephenson v. Short*, 92 N. Y. 433; S. C., 27 Hun, 380, it was argued that the two months' limitation applied only in cases where a wife, child or parent was left; but the court held that it applied to all cases of charities organized under the Act of 1848, and also held that religious and missionary societies were within the Act; and see *Kerr v. Dougherty*, 79 N. Y. 327; *Lefevre v. Lefevre*, 59 Id. 434; *Harris v. American Baptist Home Missionary Society*, 33 Hun, 411; but where a society not organized under the Act of 1848, but at one time subjected thereto by an amendment to its charter, is, by further amendment, subjected to the Act of 1860, *infra*, and from its amended charter is eliminated all reference to the Act of 1848, it is then no longer subject to the last-mentioned Act, *Harris v. American Baptist Home Missionary Society*, *supra*.

Religious corporations erected under the Act of 1813 are not subject to the Act of 1848, *Id.*

By the Act of 1860, Ch. 360, it is provided that no person having a husband, wife, child or parent shall by his or her last will or testament devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts; and that such devise or bequest shall be valid to the extent of one-half of the estate and no more.

In California, it is provided that no estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid: *provided*, that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving legal heirs, and in case such devises and bequests do exceed the legal limit a *pro rata* deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law, Civil Code, § 1313.

Under this Act it has been held that the restriction is to one-third of the gross estate, and not to one-third after the payment of debts, *Estate of W. C. Hinckley*, Myrick, 189; and see *Estate of Tobin*, *Id.* 134.

In Pennsylvania it is provided by the Act of 26 April, 1855, § 11, P. L. 332, that no estate, real or personal, shall thereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses except the same be done by deed or will attested by two credible and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law: *Provided*, that any disposition of property within said period *bona fide* made, for a fair consideration, shall not be hereby avoided. This Act is prospective only; therefore, in *Taylor v. Mitchell*, 57 Pa. St. 209, where the testator had died in 1866, leaving a will which had been made in 1843, establishing a charity, and which had not been attested in accordance with the Act of 1855, the charitable devise was upheld, SHARSWOOD, J., saying: "It is true that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the

property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time. The language of the Act of Assembly, in its ordinary use and meaning, relates to wills thereafter to be made. It is only by a technical construction that it can be made to bear a different sense. Such a construction might justly be applied to a law which on its face appears to be retrospective in order to restrain it to a prospective operation, but it would certainly be a novelty to apply it conversely. The authorities sustain this view. Most of them have been collected and reviewed by our brother READ, in *Gable's Executors v. Daub*, 4 Wr. 217. The case of *Ashburnham v. Bradshaw* arose under the Statute of 9 Geo. II., Ch. 36, which uses the words 'shall be given'; yet a will published before the statute went into effect, though the testator survived that period, was established and the trust of the charity carried into execution. This was a decree of Lord HARDWICKE, upon a certificate of eleven of the twelve judges to whom the case had been referred for their opinion on the validity in law of the devise; and although Lord NORTHINGTON is reported to have remarked, in *Attorney-General v. Heartwell*, Ambler, 451, that he thought a good deal might be said in that case against the determination, yet it has been so repeatedly and expressly recognized that its authority must now be conceded as firmly established, *Attorney-General v. Lloyd*, 1 Ves. (Sr.) 33; S. C., 3 Atk. 552; *Willet v. Sandford*, 1 Ves. (Sr.) 178, 180; *Attorney-General v. Andrews*, 1 Id. 225; *Mullack v. Souder*, 5 W. & S. 198; *Gable's Executors v. Daub*, 4 Wr. 217."

It is also held that the Act has reference, where it speaks of the devising, bequeathing or conveying, to the physical act—*i. e.*, the signing and attesting of the will; hence, in the *Appeal of Carl et al.*, 106 Pa. St. 635, where, more than a month prior to his death, the testator had made a charitable bequest, and within the month had made a codicil diminishing it, it was held that the bequest was not invalidated. It had previously been held in *Poulson's Estate*, 11 Phila. 151, where a will had been made bequeathing \$1000 to a charity, and within a month of the testator's death he revoked the legacy and gave one of \$500 to the same object, that the first legacy was entirely destroyed, and the second was an entirely new legacy and void. It is doubtful, in view of *Carl's Appeal*, how far this case is now law. If it is to be sustained at all it must be on the extremely technical ground of a difference between the diminishing of a legacy and the revocation and substitution of a smaller sum; and it is hardly thought that the law, which looks to the reason and not to the mere form, will hold that where the testator says "I reduce the legacy of \$1000 formerly given

to a certain charity to \$500," the legacy is good; but when the testator says "I revoke the legacy of \$1000 formerly given to a certain charity, and bequeath \$500 to the same charity," the legacy is void. But where there is an entire separation of the two bequests although they may be for the same amount then the legacy will be void. Thus in a very recent case, a will was made February 13, 1882, by which one-fourth of the residuary estate was given to certain religious corporations, "to be applied to the use and benefit of the missionary funds of each of the said churches." On March 15, 1885, the testatrix made a codicil, which, after stating that the testatrix "unqualifiedly" revoked the bequests aforesaid and making an additional pecuniary bequest, bequeathed one-fourth of the residuum to the same corporations, "to be applied to the use and benefit of the Home Missions of each of said churches respectively." On the 11th of April, 1885, the testatrix died. The Orphans' Court held that the bequest to the churches was void, because there was a difference in the purposes of the trusts; the Supreme Court sustained the court below, but put its decision on the ground of the separation of the devises, saying: "The entire separation of the two testamentary acts is expressed in the clearest language. In saying as she does: 'I hereby unqualifiedly revoke' the bequest previously made she thereby wholly disconnects the revocation with all and every other bequests which she has made or may make." *Appeal of the Lutheran Congregation of Union Church*, 113 Pa. St. 32.

A testator may safely change his charitable bequests, without danger of having them altogether destroyed by his death within a month, by providing that a subsequent will shall act as a revocation of a former one only if he live beyond the month; as in *Hamilton's Estate*, 74 Pa. St. 69, where the testator left a will, dated November 21, 1871, containing charitable bequests, and on January 23, 1873, made another with a codicil providing that if he should die before March 1, 1873, the will of 1871 should be taken as his last will and testament but if he outlived that time then the will of 1873 should be in force.

The statute cannot be avoided by a secret trust; but where the testator has expressed his wishes and, then, made an unconditional bequest to one who, he believes, will carry out his wishes, but who has not accepted a trust or promised to act in accordance with the testator's desires, the devise will not be held void, *Schultz's Appeal*, 80 Pa. St. 396. The Act cannot be evaded by going through the form of an unexecuted gift. Thus where a man on his death-bed gave, without consideration, a promissory note to a church corporation, the note was held void and unenforceable on account of the Act, *Weidler's Estate*, 3 Lan. Bar (Jan. 13, 1872); and so a subscription to a church made within the statutory time, *Reimensnyder v.*

Gans, 2 East. Rep. 873; but where the gift has been fully executed, as, in the case of personalty, by delivery, it will not be avoided by the Act. Thus in *McGlade's Appeal*, 99 Pa. St. 338, Mary B. Daly, being sick, on November 29, 1879, made her will containing charitable bequests and appointing McGlade her executor; a few days later, fearing that she might die, she executed a blank power of attorney to convey certain loans of the city of Philadelphia owned by her, and sent the certificates of loan and the power to the Rev. Mr. Mulholland, telling him to sell the loan and pay over the proceeds to the Archbishop of the Roman Catholic Church in Philadelphia, to be by him applied, according to the instructions of the will, in charity. Mulholland sold the loan through certain bankers, who gave him their check payable to the order of the Archbishop. Mary B. Daly died on December 20, 1879. The Orphans' Court held the gift void, and surcharged the executor with the amount thereof; the Supreme Court, however, reversed this decision, and held that the sale and gift were complete in the decedent's lifetime, GORDON, J., saying: "Now then, the question is, how do these donees take? By what title do they hold the moneys intended for their use? Under a bequest, devise or conveyance? No, under neither; but by virtue of a gift fully executed in the donor's lifetime. Such, then, being the conclusion to which the facts of the case bring us, if, nevertheless, the case is within our Act of 1855, as the court below seemed to think, the result is just this: there is a period of one calendar month in every person's life in which by no possibility can such person make a present, executed gift of any part of his or her money, or other personal assets, to a religious use or other charity. To a doctrine such as this we cannot assent. Were we in doubt as to the intent of the statute we would, nevertheless, incline to that construction of it which would infringe the least on the right of persons so to dispose of their own property as to them may seem proper. We are not among those persons who regard this Act as of doubtful utility; on the other hand, we esteem it of great public value, and are, therefore, the less disposed so to construe it as to make it the object of public odium."

The Act is strictly confined to bequests to charitable and religious uses, and therefore a bequest made within the calendar month to a beneficial association is not void under its provisions, *Swift's Executors v. Easton Beneficial Association*, 73 Pa. St. 362; but charities in the ordinary sense, although not strictly eleemosynary in character, are within the Act, *Price v. Maxwell*, 28 Pa. St. 23; *Miller v. Porter*, 53 Pa. St. 292.

It is to be observed that the Act includes religious as well as charitable uses, and that a gift to a religious use, although not charitable, falls within the Act. In *Power's Estate*, 5 W. N. C. 59, there was a devise to a

church, to be expended in masses for the repose of the testator's soul. The Orphans' Court held that this was not a charitable use, and that the statute did not apply, ASHMAN, J., saying : " So far from being free from everything of a personal, private or selfish nature, it had its origin in a motive which was in the highest degree laudable and yet in the highest degree personal and selfish. The fact that the church might remotely profit by the money the testator chose to pay for its mediation in no sense elevated the gift to the rank of a gift for the advancement of religion. The object of the testator was as purely private and selfish as if he had bequeathed a fund to the church for the erection of a monument to himself or the purchase and maintenance of a pew for his family, both of which gifts have been held not to be charities." On appeal, however, this finding was reversed by the Supreme Court, which, while waiving the question of the charitable character of the bequest, held it to be unmistakably a religious one, STERRETT, J., who delivered the opinion, saying : " It cannot be doubted that, in obeying the injunction of the testator and offering masses for the benefit and repose of his soul, the officiating priest would be performing a religious service, and none the less so because intercession would be specially invoked in behalf of the testator alone," *Rhymer's Appeal, Power's Estate*, 93 Pa. St. 142; but a gift for the education of a certain person for the ministry has been held to be neither for a charitable or a religious use, but for the private benefit of the person to be educated, *McMillen's Appeal*, 11 W. N. C. 440, reversing *McPherson's Estate*, Id. 54.

The Act of 1855, in addition to the provisions before noted, limits by its eighth section the amount of property which may be held by any charitable corporation, society, congregation or association, without special legislative sanction, to the annual value of five thousand dollars.

In Georgia, the Code provides that " no person leaving a wife or child or descendants of a child, shall by will devise more than one-third of his estate to any charitable, religious, educational or civil institution, to the exclusion of such wife or child ; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void." The effect of this Act was very learnedly considered in *Jones v. Habersham*, 3 Woods, 443, and it was held that the ninety days' limitation applied only where the wife, child or descendants of children were left by the testator ; and see *Reynolds v. Bristol*, 37 Ga. 283 ; *Wetter v. Habersham*, 60 Id. 193.

In Ohio, a devise or bequest to a charitable, religious or educational purpose by a testator leaving issue or adopted children is void, unless made at least one year before the testator's death, Rev. Stat. § 5915.

In Maryland, by the Constitution, all gifts, sales and devises of land or personality to religious sects or for religious uses without the prior sanction of the Legislature are void except of land not exceeding five acres for a church, parsonage or cemetery, and actually so used, Decl. of Rights, § 38; Const. Art. 2, § 8.

In Missouri, the Constitution, Art. I. § 13, prohibits gifts, sales or devises of land to churches, etc., but allows one acre to be held by a church, see *First Baptist Church v. Robberson*, 71 Mo. 326.

In Kentucky no church or society of Christians can hold title to land exceeding fifty acres, but such a charity may hold that amount for the purpose of erecting thereon a house of worship, parsonage or graveyard. Gen. St. (Bul. & Fel.) Ch. 13, § 3.

Conflict of Laws.

The validity of a devise of land to a charity, is said by the Supreme Court of the United States, as against the heir, to depend upon the law of the State where the land lies, and that of a bequest of personality as against the next of kin upon the law of the testator's domicile, *Jones v. Habershams*, 107 U. S. 174; and see *Fellows v. Miner*, 119 Mass. 541, but the capacity of the legatee in the State of its domicile has also been taken into consideration, and it has been held that a devise to a charitable corporation, which in the State of its domicile cannot take land, will be void in the State of the domicile of the testator, although the land devised be situated in that State, *Starkweather v. American Bible Society*, 72 Ill. 50; and so where the law of the creation of a corporation limits the amount of land which the corporation may hold, and it appears that the amount has been exceeded, a devise of realty to it will be held void although the realty is situated in another State from that of the domicile of the corporation, *Cromie's Heirs v. Louisville Orphans' Home Society*, 3 Bush, 365.

Title by Descent.

BEVAN v. TAYLOR AND ANOTHER.*

*Supreme Court of Pennsylvania, sitting in the Eastern District, December Term,
1821.*

[Reported in 7 Sergeant & Rawle, p. 397.]

CASE STATED.

Under the intestate laws of Pennsylvania, if a man die intestate, leaving neither widow nor lawful issue, nor father, brother nor sister, but leaving a mother, real estate acquired by his father, and descending to him, goes to the relations on the part of the father, in exclusion of the relations on the part of the mother, in equal degree.

THIS was an ejectment for a house and lot in Germantown, brought by Davis Bevan against Samuel Taylor and Mary Rainey, in which the following case was stated for the opinion of the court :

William Forbes and Mary Bevan were married and had issue one child, Nathaniel Forbes. During the marriage, William Forbes acquired a considerable real estate, in the city of Philadelphia, in Germantown and elsewhere, including the premises in question, and died intestate, in the year 1801, leaving his widow, the said Mary, and his son, the said Nathaniel, an infant, surviving, to whom the estate descended according to law, subject to the widow's third. In the year 1805, Nathaniel Forbes died, without having claimed the real estate, and intestate, leaving Mary, his mother, surviving, but leaving neither widow nor lawful issue, nor father nor brother, nor sister of the whole or half blood or their representatives. At the time of his death, Nathaniel Forbes left the following relations on the paternal side, namely, Samuel Taylor and Mary Rainey, the defendants, who were children of Elizabeth Taylor, the sister of his father, William

* Descent being regulated almost entirely by statute in the United States, it is impossible to select a truly leading case upon the subject of descent in general, we have therefore selected two cases which show the diverging tendencies which exist in the different States, the one toward upholding the rule of the common law as to the requirement of blood in descent, and the other ignoring it.

Forbes; William F. Taylor, brother of the said Samuel and Mary, since deceased, having devised all his real estate to Samuel and Mary.

On the maternal side, Nathaniel Forbes left Davis Bevan, the plaintiff, the brother of his mother, and Charles Pearson, Benjamin Pearson, Thomas Pearson, Bevan Pearson and Anna Bevan Garrett, children of Ann Pearson, the sister of his mother, and Tacy B. Rodgers, the granddaughter of Tacy Prior, another sister of his mother. Mary Forbes, the mother of Nathaniel Forbes, died on the 22d of February, 1817. The defendants are in possession; and the question is, whether the plaintiff is entitled to any and what portion of the real estate of the said Nathaniel Forbes. If the court shall be of opinion, that he is entitled to any portion, judgment to be entered for so much; if, on the contrary, the court shall be of opinion that he is not entitled to any part of the said real estate, judgment to be entered for the defendants.

This case was fully argued by *Sergeant* and *Binney*, for the plaintiff, who cited the different Acts of Assembly relative to the property of intestates. 7 Cranch, 461, 468; 4 Dall. 65; 2 Binn. 285; and relied on *Walker v. Smith*, 3 Yeates, 480, as expressly in point.

For the defendants, it was argued by *Chauncey* and *Rawle*, who referred to 2 Bl. Com. 224; *Shippen v. Izard*, 1 Serg. & Rawle, 222; 4 Dall. 101; 2 Id. 195; 1 Id. 131, 265; 4 Yeates, 102.

The opinion of the Court was delivered by

DUNCAN, J. On this statement of facts, the question is, does the real estate of an intestate, coming on the part of his father, descend, by the laws of Pennsylvania, to his next of kin on his father's side, or does it go to all the next of kin of equal degree to the intestate, whether paternal or maternal kindred, excluding the mother alone?

That the heir at common law takes, except in the cases enumerated in the several Acts directing the descent of intestate's estates, is a principle as firmly fixed as uniform decision can establish any doctrine of the law. It was settled by the undivided opinion of the judges of the Court of Errors and Appeals, *Johnson v. Haines*, 4 Dall. 64, and has been followed in all subsequent decisions, particularly in *Cresoe v. Laidley*, 2 Binn. 279. The same rule has been applied in the construction of the Intestate Acts of the State of Maryland, by the Supreme

Court of the United States, in *Barnitz's Lessee v. Casey*, 7 Cranch, 456. It would be dangerous to admit, that because the Legislature may have expressed an intention to form a scheme of descents, the courts would supply an omission and bring every case within the specified classes. The enumerated classes are: *First*, Where the estate descends or comes on the part of the father or mother. *Second*, Ascents from child to parent. *Third*, Estates acquired by intestates, and which have not come on the part of father or mother. *Fourth*, Descents from brother to sister. *Fifth*, Where estates come on the part of father and mother, and where the intestate leaves neither father nor mother, nor widow, nor lineal descendant, nor brother nor sister of the whole or half blood, nor their representatives, in which case, it is contended by the plaintiff, it will descend to, and be divided among, the next of kin of equal degree to the intestate, without relation to the ancestor from whom it came; and *Sixth*, That where an intestate dies and leaves no widow or lawful issue, father, brother nor sister, nor their representatives, the estate shall be vested in fee simple in the mother, unless where such estate has descended from the part of his or her father, in which case, such part as may have so come, shall pass and be enjoyed *as if such person so dying seized, had survived his or her mother*. I do not find the same provision in a case of an intestate so dying, and seized of an estate coming on the part of the mother and leaving a father; but it is now unnecessary to decide whether this is a *casus omissus*, though, at present, I am inclined to think there is no provision that the estates shall go over as if the child had survived the father. It never vests in the father. It is pretty evident, that it never was the intention of the Legislature of 1794, that under the 12th section, the father living or dead, the maternal estate should depart from the maternal line, as it would, on the plaintiff's construction, in the case of a child leaving a paternal grandfather and a maternal uncle or aunt; and if the father survived the child, by the same construction, it would pass by the father and vest in fee simple, in his father, in exclusion of maternal uncles or aunts. A proposition difficult to digest.

The plaintiff contends, that connecting the 5th section of the Act of 1797, which provides for this sixth class of cases, with the 12th section of the Act of 1794, providing that the real estate of any person dying intestate, leaving no widow, lineal descendant, brother nor sister, nor their representatives of the whole or half blood, shall descend to and

be divided among the next of kin of equal degree to intestate, then the case falls within them, and the plaintiff is entitled as one of the next of kin of intestate. To form a new system of descent, will always be found an hard task; human wisdom is inadequate to striking out, at one heat, a perfect one, without flaw. It is impossible to foresee all the consequences of an attempt so important, extensive and ramified; all the consequences and appendages cannot be provided for by the new rule. Omissions and imperfections, as they are discovered, must be supplied and remedied by subsequent laws.

This case must be approached with all the weight of the authority of *Walker's Administrators v. Smith*, 3 Yeates, 480; for did not this decision stand in the way, the court would have found little difficulty in coming to the conclusion, that it was the manifest and declared intention of the Legislature to preserve the line of descent in the blood of the ancestor from whom the estate came, for ever and for ever. I cannot distinguish the cases; it would be disingenuous, to attempt to get round or evade it. It was a contemporaneous decision, the first construction, and if it had been received and acted upon, if under it, estates had been enjoyed and transferred; become a rule of property by which the divisions of estates had been regulated and governed, it ought not now to be disturbed. But if it has passed unnoticed, until the publication of Mr. Justice YEATES's Reports; if it presents but the meagre skeleton of a case, with an instant decision, without any reason assigned but one, from which a different conclusion is palpable; if it be inconsistent with the whole canons of descent prescribed by the Legislature, and violates their plain and obvious intention, and is followed by the most contradictory, absurd and unnatural consequences, then, as it was not the determination of a court of the last resort, I cannot consider this court bound to follow it, against their own strong convictions. Strange indeed would be the doctrine, that an error or inadvertence once committed, must be persevered in; a court is not bound to give the like judgment, which has been given by a former court, unless they are of opinion the judgment was according to law. Acting otherwise would have this consequence, that because one man has been wronged by a judicial determination, therefore every man having a like case is to be wronged also. Vaugh. 383.

In *Kerlin's Lessee v. Bull*, 1 Dall. 175, C. J. MCKEAN very justly says, that where there has been a determination by two judges of the

Supreme Court, after debate, and a long acquiescence under it, there ought always to be paid great consideration to it, that the law may be certain; but in that case, he seemed to accord with the decision, and to be governed in weighing its authority, by the information he received from the gentlemen of the bar in different parts of the State, that estates had been distributed agreeable to it; and as the construction there had prevailed and had been received as a rule of property, though some might not, in their private judgment, agree with it, were the matter to be newly resolved, he thought it but reasonable to acquiesce and determine in the same way in so doubtful a case, to prevent greater mischiefs which might arise by shaking a number of estates, and from the uncertainty of the law. To all this I subscribe; and had I a doubt, or did I believe that this decision had been acted upon generally in the division of estates, I would let it rest. Far, very far from me, be the desire to unsettle the rules and landmarks of property on my own speculative opinions as to how they ought originally to have been settled. I am not so presumptuous, as to set up as a reformer of the law; it is my humble endeavor, to ascertain, as far as I am able, what the law is, and my pride and comfort, because it is my duty, to walk in the ways *quæ relicta sunt et tradita*; and if an error had been established and taken root, on which any rule of property depends, it ought to be adhered to, until the Legislature thinks proper to alter it, lest the determination should have a retrospect, and shake many titles which had been settled. It is not like rules of practice, which may be altered without danger, but rules of property ought not to be changed with every change of judges.

But this decision is a solitary and unnoticed one—one reason only given. “Viewing,” says the court, “this case in the strongest light for the appellants, we cannot go further than to say, it was a *casus omissus*, and then the well-known remark as to a last will and testament, would be applicable to this, *voluit sed non dixit*.” This was all they did say; and for the case of the appellants, they had no occasion to say anything further; for if it was a *casus omissus*, then, according to all the authorities, the heir at common law took. I have searched the papers of the learned and venerable reporter, in hopes of finding some more detailed opinion, but can find nothing but what is stated in the report. One would suppose, from the reason, the court was about to pronounce a decree of reversal. The mind is not prepared for the

conclusion ; it imports a different result. The case is a *casus omissus*, therefore, it is to follow, that the heir at common law shall take. It seems not ; but because it is not provided for, is it to be taken from him ? And why is it to be taken from him ? Because the Legislature have not taken it from him, *voluit sed non dixit*. But this is not so ; they have spoken, they have taken it from him, or divided it between him and others ; and the only question is, to whom have they given it ? There must be, in this report, some mistake, in the reason there certainly is. The accuracy of Judge YEATES was so distinguished, it is by me so much confided in, that I distrust my own judgment, and have sometimes thought, that I did not understand the case ; and I must, even now, after having pondered on it for more than a year, confess, that I cannot understand it. It is beyond my reason to comprehend how, from the court's own premises, they draw the conclusion. One thing is very certain, as I shall presently show, that Judge YEATES did not always continue of this opinion.

But what was the cardinal design of the Legislature ? To abolish the right of primogeniture, and the feudal doctrine that lands cannot ascend—to establish an equality of distribution without regard to sexes, always preserving the estate in that line of descent from which it came. When they pass beyond brothers and sisters of the whole blood, to brothers and sisters of the half blood, they must be of the blood of the ancestor from whom the estate came. So, where it is to vest in a parent on the death of a child. And where they pass on to more remote kindred, instead of one taking the whole, all having inheritable blood, standing in equal degree to the intestate, take equally, unless in the case of an acquisition of the intestate, not coming on the part of father or mother, in which case, it goes to all his next of kin. The ancestor is removed from our view ; the intestate is the *præpositus*, and not the ancestor. Wherever the Legislature introduce another, the inheritable stock, where the estate comes from an ancestor, in descents collateral, as well as in ascents to a parent, it is with a protestation, that it shall not go out of the line of the ancestor, as in the 6th section of the Act of 1794 ; if the intestate shall leave no issue, nor brothers or sisters, nor their representatives, the estate shall go to the father in fee simple, unless it has come on the part of the mother. So, in the 5th and 7th sections ; and so, in the 5th section of the Act of 1797, under which the plaintiff claims. But if the 12th section of the Act

of 1797 lets in all the next of kin, without regard to blood, the half blood will be let in equally with the whole; but this cannot be so; for the 7th section of the Act of 1797 declares, that on the failure of brothers and sisters of the whole blood, the brothers and sisters of the half blood shall come in, except such estate of such as came from some one of his ancestors, in which case (that is, in every case where the estate so comes), all who are not of the blood of such ancestor shall be excluded from such inheritance. So, in the 11th section of the Act of 1794, brothers of half blood take in preference to remote kindred of the whole blood, unless where the estate came from an ancestor, in which case, all who are not of the blood of such ancestor shall be excluded from the inheritance.

Here the Legislature recognize, in the case of more remote kindred than brothers and sisters, the preference to be given to the whole blood, and consider the blood of the ancestor from whom the estate came, as alone inheritable. "In preference to the more remote kindred of the whole blood," is a declaration plain, that only such blood can inherit; and that in descents to remote kindred, so far from losing sight of the blood of the ancestor, their right is acknowledged and preserved. If the exclusion is only applied to a case of an intestate leaving a brother of the half blood, and do not extend to more remote relations, this absurdity would follow, that if one died intestate, seized *ex parte paterna*, leaving a maternal brother, he would be excluded; but if he left only a maternal uncle, he could take, to the exclusion of more remote paternal relations. The position I maintain, is this, that taking into one view, the whole scheme of descent, under the Acts of 1794 and 1797, it was the intention of the Legislature, in every grade of descent, to exclude from the inheritance all who were not of the blood of the ancestor from whom the estate came, and to preserve it in the line in which it came; in other words, that the ancestor is the *commune vinculum*, whether the estate ascends or descends. The father may take on the death of his child to whom an estate was given by his father, because he is of the blood of that father; he will not take where the child takes from a maternal grandfather or grandmother, because he is not of their blood. The declaration in the 7th section of the Act of 1797, and 11th section of the Act of 1794, I incorporate into the whole system; for different statutes, made at different times, are to be explanatory of, and construed into, each other, as in the

construction of the Statute of Distribution, 22 & 23 Car. II. ch. 14, and statute 1 Jac. II. ch. 16. The proviso of the latter statute, that there shall be no representation beyond brothers' and sisters' children, is incorporated into the first, on the rule that statutes *in pari materia* shall be construed into each other. These statutes are said to be very incorrectly penned, and therefore, the latter is to be construed according to the intention of the Legislature. *Stanley v. Stanley*, 1 Atk. 455.

General words in one clause of a statute may be restrained by a subsequent clause ; and there is no difference, whether the restraint be in a prior or subsequent clause ; and it is consistent with the true construction of a statute, to make a clause conform to other parts of the law, and its general system. We have a remarkable and apposite instance of this construction, in *Brown v. Tuberville*, 2 Call, 390, on the intestates Acts of Virginia, which provided, that if there be no issue, mother, brother or sister, or their descendants, and the estate shall not have been derived, by purchase or descent, from either father or mother, that it shall be divided into two moieties, one of which shall go to the paternal, and the other to the maternal kindred. The intestate was an adult, and the Legislature having omitted to confine it to the case of an infant intestate, although it was their apparent intention to refer it to the former part of the law which so confined it, the court, in their construction, interposed the words, *in case of an infant intestate*, so as to make this clause read, "and the real estate shall not, in case of an infant intestate, be derived from the father or mother." Sections are not considered as distinct enactments ; ancient statutes were without sections. All are parts of the same plan, and to be drawn together to come at their true meaning ; if consistency and the sense of the thing require it. A general declaration in one section will run through all, and this is always done when absurd consequences would otherwise rise.

Let us see how this will work. Nathaniel Forbes, taking from the father, is the proprietor, who dies without issue, brothers and sisters of the whole or half blood, or their legal representatives, leaving a mother and Davis Bevan, the plaintiff, the brother of his mother. The mother cannot take, but the brother can. If he had left a maternal grandfather or grandmother, they would have taken the whole, in exclusion of the brothers and sisters (and their children) of the father, for they would be preferred, being nearer of kin, than uncle or aunt, and possibly, they would take, though his mother could not. Our

humanity is shocked by such distribution, where the basis of the law is equality; our understanding calls for some reason of policy, for this most unnatural preference; it may call in vain, for none such has been assigned, for none such exists. First, it is said, in this remote degree, blood was entirely lost sight of, and its rights abolished. If this be so, then the half blood must be let in under the 12th section, although by the express terms of both acts they are excluded. Again, it is said, all are to be let in, because of the inconvenience of inquiry after many years, into the question of whom the estate came from. But this does not hold; for if there is a parent living, you must inquire into the fact, or the parent takes the whole. It is not because nature points out this course, and the law makes the disposition which the intestate most probably would have done, had he made a will from natural affection; for the disposition is most unnatural, and we cannot suppose that the Legislature forgot, that of all human beings, the father and the mother were the dearest and the nearest next after a man's own children.

But there is another reason assigned, and that is, that under the 12th section of the Act of 1794, the real and personal estate are to go together and to the same person, that as to the personal estate, there is no inquiry from whom it came, but if it was admitted as to the real, the estates would go differently and to different persons. This, at first, presents a difficulty; but on analyzing it, it furnishes the strongest evidence, that when the Legislature used the term, next of kin, as to personal estate, it included all the next of kin, under the Statutes of Distribution, unless otherwise expressed, but as applied to real estate, it meant only those of inheritable blood, as in the intestate Act of 1705, Galloway's Ed. 25, "if no children, then to next of kin of intestate in equal degree," is, in a subsequent section, declared to mean heir-at-law. So, in the same Act, if an intestate dies without known kindred, the real estate shall escheat to his lord, and his goods to the proprietary. Known kindred is there construed according to the nature of the property, and differently as to real and personal estate; as to the first, signifying next of kin of inheritable blood, capable of inheriting of the blood of him from whom the estate came; but as to personal, kindred generally, without relation to blood; for if it was not so, the land would not have escheated, if there was any kindred of the half blood—any who would be entitled under the Statutes of Distribution.

There are cases where the same words shall have different construc-

tions, according to the nature of the property to which they are applied. As where lands and a chattel interest are devised to one, and if he die without leaving issue, then a devise over, the devisee has an estate-tail in the land, leaving no issue, being understood as an indefinite failure of issue; but as to chattel interests, they are construed as, leaving no issue at the time of his death, and all laws are to be construed according to the subject-matter. The words, legal representatives, may be referable either to heirs, executors or administrators, according to the subject-matter, and when they relate to lands, they are always considered as referring to heirs. *Duncan's Lessee v. Walker*, 1 Yeates, 213. And there is good reason for the difference in this case, the evidence of the titles depending on written instruments, may be traced *ad infinitum*, but chattels being of a fluctuating nature, consisting often in the use, are incapable of being traced to their origin.

But if the door were opened to all the next of kin, without relation to inheritable blood, what is to prevent an alien from taking (as an alien, under the 12th section of the Act of 1794, may take personal estate), if the real and personal estate must go together? Here is a dilemma; an alien may be next of kin, and take personal estate, he may be nearest of kin, yet he cannot inherit real estate, and why cannot he inherit? for he is next of kin, and would be included by the words of the Act; simply, because in him there is no inheritable blood. Where the Legislature exclude the mother, it is not an exclusion *nominatim*, a personal disability; when the Legislature excluded the mother they excluded all, who, in deducing title and pedigree, drew it from or through the mother, all on her part. Why is the half blood—even a brother excluded? because the more remote blood of him from whom the estate came, is preferred before those in propinquity of blood of the intestate. Why is the mother excluded? because not of the blood of the ancestor; not because she is not of the blood of the child, but because she is not of the blood of him from whom it came to the child. Why, in the name of common sense and common humanity, exclude the mother and give to the grandmother? why exclude the mother to let in remote kindred of her line? If the root cannot take, shall the branches?

I said the case of *Walker v. Smith* was an unnoticed case. It certainly would have been a leading case, where a question on which the doctrine came necessarily before the court arose, yet, it never has been quoted

by the counsel, never stated by the court. In *Cresoe v. Laidley*, 2 Binn. 279, this provision in the 12th section was under consideration, its operation on a paternal estate was fully and ably canvassed by the counsel concerned in this cause, and one of whom was in *Walker v. Smith*, and it was then contended, that this section had no relation to paternal estate, but was confined to estates purchased by the intestate. It is true, the court decided it on the ground of *casus omissus*, the mother and a brother of the half blood living. Still, *Walker v. Smith* had a strong bearing on the question; yet it was unnoticed by the counsel, passed over in silence by the court; and in *Harris v. Hayes*, 6 Binn. 422, it was again passed over in the court's decision, without notice. I am then justified in saying, it was still-born, buried in oblivion, until the publication of Judge YEATES's Reports. I have made inquiry in the country, of many gentlemen of the bar; such a principle they had never heard of, until they found it in these reports, and I am entirely convinced, that by conforming to this decision, more titles would be disturbed, than by rejecting it.

But I said, that Judge YEATES did not always continue of the same opinion, and it has relieved my mind of a great weight, to find that he has not done so; it lessens the heaviness of the duty and responsibility in deciding so important a principle of the law of descents, differently from the very learned and distinguished judges who preceded us. For in *Shippen v. Izard*, 1 Serg. & Rawle, 226, we have the opinion of the Chief Justice and Judge YEATES; it is true, it was not the direct matter in judgment, but the minds of the court were occupied by the different relations of mother and son; the whole law was considered. The Chief Justice says, "if the defendant's construction is not supported by the words of the law, still less is it so, by what we may suppose to be the spirit. It is reasonable, that land which was devised to a son by his father's will, or suffered to descend to him, should continue in the line of the father, without the mother's taking any part of it, *for this is no more than the preserving it in the line in which it was originally acquired, and that such was the intention of the Legislature, may be pretty clearly perceived from a view of the whole law.*" Coming from the father is, in this case, considered as coming in the line of the father. But still stronger is the observation of Judge YEATES, and in most direct opposition to *Walker v. Smith*. "The Legislature had two objects in view, to abolish the feudal principle, that lands cannot lineally

ascend, and that sisters shall inherit equally with their brothers, 'but in this and other parts of the Act, sedulous attention is shown, that the property shall not go out of the 'line of the father or mother, who acquired it, respectively.' Such a principle is highly congenial to our own feelings in family arrangements, and operates powerfully as an incentive to honest industry; the bearing of the law is to be collected from all its parts taken in connection with each other." Here then, we have the direct opinions of the spirit, and whole view of the laws, taken in connection; if I had any doubts, these opinions would remove them; but I never did for a moment doubt, though I might have startled at Walker and Smith; coming upon me, as it did by surprise, it occasioned a pause. But, after the most anxious deliberation, to me, it is clear intention, written in capital letters, in the Act of 1794, and the explanatory Act of 1797, that all who are not of the blood of the ancestor from whom the estate came, are excluded from the inheritance; however remote in degree the descent may be, the lines in which the estate came are preserved *ad infinitum*, and the blood of the ancestor runs through every clause of these Acts; consequently, that the plaintiff is not entitled, and judgment must be entered for the defendants.

Judgment for the defendants.

· TILGHMAN, C. J., did not sit in this cause, being interested in the principle to be decided.

ELIJAH PARKER, Petitioner, *v.* ZADOCK NIMS *et al.*

Superior Court of Judicature of New Hampshire, Cheshire, May Term, 1822.

[Reported in 2 New Hampshire, 460.]

A. died seized in fee of land, which had descended to him from his father, leaving uncles and aunts on his father's and on his mother's side, who were the next of kin, and also children of a deceased aunt. It was held that the land descended in equal shares to the uncles and aunts on both sides, but nothing descended to the children of the deceased aunt.

THIS was a petition for partition of certain real estate, in which the petitioner alleged that he was seized of two-eighth parts of the land as tenant in common with Zadock Nims and others, and prayed partition.

The case was submitted to the decision of the court upon the following facts: One David Nims, being seized of the land mentioned in the petition, conveyed the same to his son Alpheus Nims, upon whose death the same descended to his son George Nims, who entered and became seized as the law requires, and remained seized until the year 1818, when he died, leaving no father, mother, brother, or sister, or children; but leaving five uncles and aunts on his father's side, and three uncles and aunts on his mother's side, and several children of a deceased aunt on his father's side. The petitioner claimed the shares of an uncle and an aunt on the mother's side.

BY THE COURT. Our statute of February 3, 1789 (1 N. H. Laws, 207), enacts that "where there are no children or child of the intestate, the inheritance shall descend equally to the next of kin, in equal degree, and those who represent them. No person to be admitted as a legal representative of collaterals beyond the degree of brothers' and sisters' children." It is very clear that the children of the deceased aunt take nothing in this case. They are beyond the degree of brothers' and sisters' children. 1 Peere Williams, 593, *Bowers v. Littlewood*; Lovelass on Wills, 77. It is equally clear that the uncles and aunts on the mother's side are in this case as well entitled to a share as those on the father's side. Our statute of descents is copied, in substance, from the English statute of distributions (22 and 23 Car. 2, c. 10); and we never look to the source whence the estate was derived, to determine who shall inherit, except in cases where our statute has made that circumstance material. 1 P. Williams, 53; Lovelass on Wills, 80. We are therefore of opinion, that the petitioner is entitled to two-eighth parts of the land.

"Descent, *descensus*," says Sir EDWARD COKE, "cometh of the Latin word *descendo*; and, in the legal sense, it signifieth when lands do by right of blood fall unto any after the death of his ancestors; or a descent is a means whereby one doth derive him title to certain lands as heir to some of his ancestors," Co. Litt. 13 b. BLACKSTONE says: "Descent or hereditary succession is the title whereby a man on the death of his ancestor acquires his estate by right of representation as his heir-at-law," Com. Lib. 2, p. 201; but, in this country, in view of the alterations made in the

rules of descent by statute in every State in the Union, descent may be defined to be the means whereby one derives title by the right of succession to the land of an intestate.

In this Country, Right of Succession almost entirely Statutory—Status of Heirship fixed by Law at Time of Decedent's Death.

The right of succession may be said in this country to be entirely statutory, so few are the cases in which the old common law rule prevails, irrespective of those wherein its provisions have been enacted, and as such it is entirely within the control of the Legislature, which may alter the rules of descent at its will and arbitrarily, see *Watson v. Thompson*, 12 R. I. 466; *Gregley v. Jackson*, 38 Ark. 487, and, therefore, the status of heirship is fixed in accordance with the law as it stands at the time of the ancestor's death, *Lee v. Smith*, 18 Tex. 141.

Use of Heir in Sense Broader than that of the Old Common Law.

As a consequence of this legislative control of the question of heirship, we have amongst us many persons spoken of and regarded as "heirs" who, under the old common law, could never have filled that position, but who, nevertheless, fall within the definition of a person upon whom the law casts an estate of inheritance immediately upon the death of the ancestor, that is if the term ancestor be deprived of its significance dependent upon blood and be used as equivalent to one who has died intestate, see *Leach v. Cooper's Lessee*, Cooke, 249; thus in *Noland v. Johnson*, 5 J. J. Mar. 351, a mother is spoken of as heir to her child, and in *Sutherland v. Sutherland*, 69 Ill. 481, a wife as heir to her husband—and where the word "heirs" is found in an American statute, it must be interpreted in the American or statutory sense, even where the heirs mentioned are those of a British subject, the estate as to which the rights of heirship are involved being lands in this country, as in *Eslava v. Doe ex d. the Heirs of Farmer*, 7 Ala. 543, where the statute before the court was an Act of Congress relinquishing the rights of the United States to certain lands to a British subject and his heirs.

Common Law Rules of Descent prevail in Absence of Statute.

While, however, the common law as to descent has been so far supplied or departed from in this country as to be of practically little force, it is to be noted that it is so far recognized as the foundation of our law that, whenever a statute does not prescribe otherwise in a given case of

descent he who would have been heir at common law in England will take here and the common law rules for ascertaining the heirship will prevail, *Johnson v. Haines*, 4 Dall. 64; *Cresoe v. Laidley*, 2 Binn. 279; *Fidler v. Higgins*, 21 N. J. Eq. 138; *Barnitz's Lessee v. Casey*, 7 Cr. 456; *Bevan v. Taylor*, 7 S. & R. 397; N. Y. R. S. Pt. 2, Ch. 2, § 16, p. 2213; in Indiana, however, the common law is not recognized even to the extent above set out, and it is there held that "the presumption should be that where a canon of the English laws of descent is not found in our statute it was omitted because it was not desired that it should be in force in this State," *Cloud v. Bruce*, 61 Ind. 171.

As, therefore, our law in general is based on the common law, although our statutes of descent have very generally followed, with variations, the 118th novel of Justinian, a convenient way of taking a view of the law of descent prevalent in the United States will be by taking up the English canons of descent and noting how far they are and are not in force amongst us, and how far the various American rules depart from them.

Canons of Descent—Inheritances Lineally Descend *in infinitum* but never Ascend Lineally—Rule of Actual Seizin.

The first English canon is—Inheritances shall lineally descend to the issue of the person who died last actually seized *in infinitum*, but shall never lineally ascend, Blackst. Com. Lib. 2, p. 208. The part of the rule which provides for the descent to the issue, is the rule in all of the United States. With us, however, the requirement of actual seizin is not in force except perhaps in Maryland, see *Chirac v. Reinecker*, 2 Pet. 613; in some States, the rule of actual seizin is said never to have been in force and to be inapplicable to the conditions of landed property in this country, *Guion v. Burton*, Meigs, 565; *Hillhouse v. Chester*, 3 Day, 166; *Thompson v. Sandford*, 13 Ga. 238; *Kelly's Heirs v. M'Guire*, 15 Ark. 555, and the statutes have generally provided for succession where a person dies intestate, seized, possessed, entitled to or having any right, title or interest, or have used kindred expressions, so that, in the United States, ownership in law or in equity, or seizin in law is sufficient to make the intestate the person from whom descent is to be derived, *Moore v. Rake*, 26 N. J. Law, 574; *Bell v. Dozier*, 1 Dev. L. 333; *Thompson v. Sandford*, 13 Ga. 238. In New York, before the passage of the Revised Statutes, actual seizin or the right of entry was required, see *Bates v. Shraeder*, 13 Johns. 260, in which case A. having died entitled to a reversion expectant upon a life estate, it was held that A. did not constitute the stock of descent, but that a person claiming the land as heir must show himself to be heir to the person who

held the estate of inheritance immediately preceding the life estate; and see *Jackson ex d. Gomez v. Hendricks*, 3 Johns. Cas. 214; *Jackson ex d. Lawrence v. Hilton*, 16 Johns. 96; but the rule was confined to cases in which the person owning the reversion or remainder claimed by descent, and, therefore, where a remainder had been acquired by purchase, including devise, the owner thereof became a new stock of descent, *Vanderheyden v. Crandall*, 2 Denio, 9, affirmed *sub nom. Wendell v. Crandall*, 1 N.Y. 491; and *possessio pedis* seems never to have been necessary, *Jackson ex d. Austin v. Howe*, 14 Johns. 405, and see *Jackson ex d. Jackson v. Sellick*, 8 Johns. 269. The rule of law is now different, the Revised Statutes providing for descent in the case of an intestate having any right, title or interest in or to land or other real estate. R. S. 751, § 1, 754, § 27; 4 Kent. Com. 388.

The requirement of actual seizin formerly existed in North Carolina, see *Lawrence v. Pitt*, 1 Jones L. 344, in which case the opinion in *Bell v. Dozier*, 1 Dev. L. 333, was criticized and said to contain assertions not pertinent to the facts of the case; but since the adoption of Revised Code, "any interest" in land is descendible and, therefore, neither actual nor legal seizin is required in the person from whom descent is to be traced, *Sears v. M'Bride*, 70 N. C. 152.

The second part of the canon, viz., that the inheritance shall never lineally ascend has been generally abrogated in the United States—see statutes of the various States *passim*, *Davis v. Rowe*, 6 Rand. 355; *Shaffer v. Nail*, 2 Brev. 160; *M'Dowell v. Addams*, 45 Pa. St. 430; *Fowler v. Trewhit*, 10 Ala. 622; *Kelly's Heirs v. M'Guire*, 15 Ark. 555; but it would be going too far to say that it is utterly and altogether abolished, thus, in New Jersey, it is held that while the canon is modified to a certain extent and so far as to permit a father to inherit from his child, it is not abolished, and that under the sixth section of the Statute of Descents, viz: "When any person shall die seized . . . without leaving lawful issue . . . a brother or sister . . . or the issue of any such brother or sister, and without leaving a father or mother capable of inheriting by this Act the said lands . . . and shall leave several persons all of equal degree of consanguinity to the person so seized, the land shall descend to the said several persons as tenants in common in equal parts, however remote from the person so seized the common degree of consanguinity may be"—a grandfather could not inherit from his grandson, *Taylor v. Bray*, 32 N. J. L. 182, affirmed in *Bray v. Taylor*, 36 Id. 415, and see *Smith v. Gaines*, 35 N. J. Eq. 65.

Before leaving this canon, it may be well to note that while a father could not at common law take from his son directly, yet he might in some cases take indirectly, for where an uncle had taken land as heir to his nephew, the father of that nephew might acquire the same land by descent,

not as heir to his son but as heir to his brother, Litt. sec. 3; Co. Litt. 10 b. *Gardner v. Collins*, 2 Pet. 58.

Male Issue Preferred to Female.

II. The second canon of the common law is, that the male issue shall be admitted to inherit before female, Blackst. Com. Lib. 2, p. 213. This rule has been formally abolished in several of the United States, see New Jersey, Acts, May 24, 1780; Feb. 5, 1816, P. L. 7; *Bray v. Taylor*, 36 N. J. L. 415; *Fidler v. Higgins*, 21 N. J. Eq. 138; Virginia, Act of 1785, *Davis v. Rowe*, 6 Rand. 355; North Carolina, Act of 1808, *Bell v. Dozier*, 1 Dev. L. 333; Code of 1883, Rule 2, and may be said to be generally non-existent in this country. It may be further said that for all purposes of inheritance there is no distinction between male and female either in lineal or collateral inheritance; thus in Maine, the equality of the sexes has been carried so far that in the case of an estate which came by inheritance from the intestate's father, his maternal as well as paternal grandparents were held to take, *Albee v. Vose*, 76 Me. 448, and in *Decoster v. Wing*, Id. 450, in the case of an estate similarly derived, a maternal grandmother was preferred to uncles and aunts, and see R. S. c. 75, rule 5. In *McCracken v. Rogers*, 6 Wisc. 278, it was argued that preference of male relatives still existed in Wisconsin in the case of collateral inheritance, but this position was denied by the court.

In some States, there may be found a modified preference of males or the male stock in cases where the estate which is to be inherited has come to the intestate by purchase, the estate in such a case passing first to the father of the intestate and those of the paternal ancestral blood, and only in default of such relatives to those of the maternal blood of equal degree. Thus in Maryland, it is provided that, in the case of an estate so acquired, after the father and mother, the paternal grandfather and his descendants shall take, and in default of them the maternal grandfather and his descendants, and so on, alternating the next male paternal and maternal ancestors and descendants, giving preference to the paternal line, R. C. (1878), Art. 47, § 1; and in Virginia, it is provided, after the division of the estate into moieties, that each moiety shall pass to the nearest lineal male ancestors and for want of them to the nearest lineal female ancestors and their descendants, Code (1873), Ch. 119, § 1. The same rule prevails in West Virginia, Rev. Stat. (1879), Ch. 66, § 1; Rhode Island, Pub. Stat. (1882), Ch. 187, § 2, p. 489; Florida, McClell. Dig. Ch. 92, § 1, p. 468, and a preference was formerly given in Arkansas, *Kelly's Heirs v. McGuire*,

15 Ark. 555; *Magness v. Arnold*, 31 Id. 103; but by the Revised Statutes (1884), § 2522, the preference seems to be confined to the father personally.

In Connecticut, where under the statute of descents the real and personal property are blended, it is provided that the estate shall be so divided that the male heirs shall have their part in the realty, unless the court shall find that the heirs, male and female, will be best accommodated otherwise, Gen. Stat. (1875), Tit. 18, Ch. 11, Art. 2, § 6.

A preference is given to the father personally in the case of an acquired estate in Delaware, Rev. Code (1874), Ch. 85, § 1, p. 514; Ohio Rev. Stat. (1884), § 4161.

A preference irrespective of descent or acquisition is given to the father personally in Alabama, Code (1876), § 2252; Arkansas, Dig. (1884), § 2522; California, Civil Code (Hittell, 1876), § 6386; Colorado, Gen. Stat. (1883), par. 1039, p. 384; Georgia, Code (1882), § 2482, p. 609; Maine, Rev. St. (1875), Ch. 75, § 1; Michigan, Ann'd Stat. (Howell, 1882), Ch. 219, § 5772 *a*; Minnesota, Gen. Stat. (1878), Ch. 46, § 3; Nebraska, Comp. Stat. (1885), Ch. 23, § 30, p. 288; Nevada, Comp. Laws, vol. i. § 794, p. 194; New Hampshire, Gen. Laws (1878), Ch. 203, § 1, p. 476; New Jersey, R. S. (1877), p. 297, pl. 1, etc.; New York, R. S. (Throop, 1882), Pt. II. Ch. II. §§ 1-13, p. 2211; Oregon, Gen. Stat. (1872), Misc. Laws, p. 547; South Carolina, Gen. Stat. (1882), § 1845; Vermont, Rev. Laws (1880), § 2230.

In Delaware, Maryland, New Jersey and New York there is an express exception of the preference of the father or the paternal line in cases of estates derived *ex parte materna*; and of course in States where the descent is confined to the blood of the ancestor or first purchaser the mother can in no case be excluded or postponed to the father in the inheritance of an estate derived from her line.

Canon of Primogeniture.

III. The third common law canon is, that where there are two or more males in equal degree the eldest only shall inherit, but the females all together. The first part of this rule, to which certain exceptions by custom existed in England, as in gavelkind lands and lands held by the custom of borough English, is not law in any of the United States. Primogeniture has been universally abolished, sometimes expressly and sometimes by the establishment of another course of descent, see *Lessees of Brewer v. Blougher*, 14 Pet. 178; *Davis v. Rowe*, 6 Rand. 355 and statutes *passim*. In some States, however, a preference was formerly given to the eldest-born son, even after the abolition of his exclusive right of inheritance. Thus, in Rhode Island,

the common law canon was abolished by Act in 1718, but by the same Act it was ordained that a double share should be given to the eldest son. This Act was repealed in 1728, but in 1770 was practically re-enacted; in 1772, the right of the eldest to a double share was taken away. A similar preference was, we believe, formerly given to the eldest son in Massachusetts.

The abolition of primogeniture does not affect the descent of estates tail, *Guthrie's Estate*, 37 Pa. St. 18; *Lyle v. Richards*, 9 S. & R. 322; *Goodright v. Morningstar*, 1 Yeates, 313; or of trusts, which will still descend to the heir at common law, *Lessee of Jenks v. Backhouse*, 1 Binn. 91; *Baird's Appeal*, 3 W. & S. 459; *Den ex d. Wills v. Cooper*, 25 N. J. L. 137; *Martin v. Price*, 2 Mich. Eq. 412; Rev. Code, Maryland, Art. 47, § 34, but the rule seems otherwise as to trusts in Kentucky, and it was there said by OWSLEY, J., in *Waggener v. Waggener*, 3 T. B. Mon. 542, that if a conveyance were made by part only of the heirs of the trustee "the title of those by whom made would pass by the conveyance, but to pass a perfect title the whole of the heirs should unite in the conveyance."

With the exceptions above noted, the effect of all the statutes of descent in the United States is to cause all the descendants or relatives of the same degree to take equally; in some States they are said to take as coparceners, in others as tenants in common—but it is believed that there is no practical difference in the method of taking the estate by inheritance, and that in each case it is equivalent to the inheritance by the custom of gavelkind, with the addition that female relatives stand on an equality with the male.

Representation.

IV. The fourth canon is: The lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the ancestor himself would have done had he been living.

This canon is in force in all of the United States. The question of representation as applied amongst the collateral relatives of a decedent is one, however, upon which there is some difference, and while, in the order we have adopted, it might seem more properly to be considered later, under the head of collateral inheritance, yet for a convenience it may well be taken up here.

In some States the right of representation does not extend beyond the lineal descendants of brothers and sisters, Alabama, Code (1876), § 2254; *Hitchcock v. Smith*, 3 S. & P. 29; Mississippi, Code (1880), § 1271;

Vermont, Rev. Laws (1880), 2230; Connecticut, Stats. of 1885, Ch. 110, § 198; Louisiana, Code, Art. 897; or the degree of brother's and sister's children, New York, R. S. Pt. 2, Ch. 6, Art. 3, § 75, p. 2303; Illinois, Rev. St. (1883), Ch. 39, Art. 1, § 1, p. 439; Tennessee, Code (M. & V. 1884), §§ 2430, 2807; *Brother v. Francisco*, 1 Heisk. 511; South Carolina, Gen. Stat. § 1845, subsec. 2; Georgia, Code (1882), § 2484, *Wetter v. Habersham*, 60 Ga. 193; Maryland, Rev. Code (1878), Art. 47, § 27, *McComas v. Amos*, 29 Md. 132; *Porter v. Askew*, 11 G. & J. 346; or grandchildren, Georgia, *supra*. New Hampshire, Gen. Laws (1878), Ch. 203, § 3; *Parker v. Nims*, 2 N. H. 460; New Jersey, Act Apr. 16, 1846, Rev. St. p. 297, pl. 2. Where this rule prevails the children of deceased uncles and aunts are excluded from inheritance when uncles and aunts are in existence, *Levering v. Heighe*, 2 Md. Ch. 81; *Ellicott v. Ellicott*, Id. 468; *Good v. Herr*, 7 W. & S. 253; *Herr v. Herr*, 5 Pa. St. 428; *Parr v. Bankhart*, 22 Pa. St. 291; *Montgomery v. Petrikin*, 29 Id. 118; *Porter v. Askew*, 11 G. & J. 346; *Levering v. Levering*, 3 Md. Ch. 365; and a granduncle will inherit to the exclusion of children of a deceased grandmother, *Clayton v. Drake*, 17 Oh. St. 367. The expression "children" may be said generally to include grandchildren, *Eshleman's Appeal*, 74 Pa. St. 42, but in California it is held otherwise, *Estate of William Curry*, 39 Cal. 529.

Prior to 1855, the law in Pennsylvania limited representation to the children and descendants of brothers and sisters, *Perot's Appeal*, 102 Pa. St. 235; by the Act of 27 April, 1855, P. L. 368, it was, however, enacted that "among collaterals, when by existing laws entitled to inherit, the real and personal estate shall descend and be distributed among the grandchildren of brothers and sisters and the children of uncles and aunts by representation." The effect of this statute was to render competent to take by representation two classes who were formerly incompetent, *Lane's Appeal*, 28 Pa. St. 487; *Brenneman's Appeal*, 40 Id. 115; *Hayes's Appeal*, 89 Id. 256, but the Act does not extend to second cousins, *Estate of Eliza Cledaniel*, 12 Phila. 54; and in *Perot's Appeal*, *supra*, it was held that the grandchild of a deceased great granduncle could not take with a child of the same great granduncle, the right of representation not extending so far.

The right of representation was formerly in Maine restricted to brothers' and sisters' children, *Quinby v. Higgins*, 14 Me. 309; but the right of representation was extended to grandnephews and nieces, by R. S. 1857, Ch. 75, § 1; *Doane v. Freeman*, 45 Me. 113; *Reynold's Appeal*, 57 Id. 350.

In New Jersey, it was at one time held that the common law rule which permitted representation to extend *in infinitum* had not been altered in

that State even with reference to collaterals, and it was, accordingly, held by the chancellor that the remote descendants of deceased uncles were in the same degree as the living uncles, *Fidler v. Higgins*, 21 N. J. Eq. 138, and see *Den ex d. Rodman's Heirs v. Smith*, Penning. 2; but this position was overthrown when the question came before the court of last resort, for in *Schenck v. Vail*, 24 N. J. Eq. 538, the chancellor, having directed his opinion in *Fidler v. Higgins* to stand as the opinion in the later case, his decree was reversed by the Court of Errors and Appeals, which held that, under the New Jersey statute of descents, the class of kinsman next in degree of consanguinity to the intestate took to the exclusion of those standing in a more remote degree. Representation is, however, recognized in New Jersey as extending to the issue of nieces and nephews, Act Apr. 16, 1846.

The right of representation is confined to descendants, and, therefore, the fact that a statute declares a mother to be heir to her child will not enable the mother to take, as representative of her child who died before his father, land that would have come to the child had he survived his father, *McMenomy v. McMenomy*, 22 Iowa, 148; *Journell v. Leighton*, 49 Id. 601; *Will of Overdieck*, 50 Id. 244, nor can a parent take, as representing a deceased child, an inchoate right of inheritance, *Leonard v. Lenning*, 57 Iowa, 648.

One of the results of the canon of representation is the doctrine of distribution or inheritance *per capita* or *per stirpes*, and it can readily be seen that it will often make a very material difference to heirs whether distribution is to be made to all of a class equally or as representing respectively two or more ancestors whose offspring were not equally numerous. In some States the doctrine of representation is carried so far that it causes descendants of heirs to take, collectively, only the portion that would have been taken by the ancestor, representing whom they claim, although all the descendants stand in equal degree of consanguinity to the intestate. This is the case in the matter of lineal descendants in Georgia, Code (1882), § 2484, Subd. 4; North Carolina, Code (1883), § 1281, Rule 3; *Crump v. Faucett*, 70 N. C. 345; Delaware, Rev. Code (1874), Ch. 85, § 2, p. 515, and may be said to be the general rule, but in some States it is provided by statute that where all descendants are in equal degree they shall take *per capita*, Massachusetts, Pub. St. (1882), Ch. 125, § 1; Missouri, Rev. St. (1879), § 2165; Ohio, Act Mar. 14, 1853, §§ 5, 6, 7; R. S. (1884), §§ 4164-67; Pennsylvania, Act Apr. 8, 1833, § 14, P. L. 319; *Eshleman's Appeal*, 74 Pa. St. 42; New York, R. S. (1882), Pt. 2, Ch. 6, Lib. 3, § 75; Virginia, Code (1873), Ch. 119, § 3; West Virginia, Act 1882, Ch. 94, § 3; Texas, Rev. Stat. (1879), § 1652; Indiana, Rev. St. (1881), § 2468. In Indiana

it is held that where the lineal descendants take *per capita* they take directly from the intestate, *Brown v. Taylor*, 62 Ind. 295; but the old rule of representation is maintained where the descendants stand in unequal degrees, in which case they will take *per stirpes*, the origin of the stirps being found in the same degree as that of which there is a living representative, *Cox v. Cox*, 44 Ind. 368.

As to collaterals, the general rule seems to be, so far as the authorities go, that where they are in equal degree they will take *per capita*, but where in unequal degree *per stirpes*.

In Pennsylvania this is declared by statute to be the rule, Act of April 8, 1833, § 14, and see *De Haven's Estate*, 1 Clark (Pa.), 336; *Miller's Appeal*, 40 Pa. St. 387; *Krouts's Appeal*, 60 Id. 380; *Illig's Estate*, 3 Luz. Leg. Ob. 103; *Lebo's Appeal*, Id. 103; but the rule does not apply to those classes of heirs who are allowed to take, by representation, by virtue of the Act of 1855, viz., the grandchildren of brothers and sisters and the children of deceased uncles and aunts, and they take in all cases *per stirpes*, *Davis's Estate*, 14 Phila. 256; *Brenneman's Appeal*, 40 Pa. St. 115; *Hayes's Appeal*, 89 Id. 256.

The rule was upheld in Maine with regard to the Act of 1857, which, it was argued, allowed grandnieces and nephews to take *per capita* or numerically with nephews and nieces, but the court held that heirs of that class must take *per stirpes*, while any of the older class remained, *Doane v. Freeman*, 45 Me. 113, but there seems to be no decision as to whether in any event the grandnephews and nieces could take *per capita*.

In Massachusetts the question arose under the Gen. Stat. Ch. 61, § 1, cl. 5, and the court held that nephews and nieces would take amongst themselves *per capita*, MORTON, J., saying: "The policy of our laws is that when heirs are in equal degree of consanguinity to the intestate, they inherit *per capita*, or in equal shares, but when they are in different degree those in the more remote degree inherit *per stirpes*, or such portion as their immediate ancestor would inherit if living. *Knapp v. Windsor*, 6 Cush. 156, 162. Chief Justice SHAW, in the case cited, says that the rule of representation applies only from necessity or where there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother or sister," 111 Mass. 389. The present Massachusetts statute affirms the above position, Pub. Stat. Ch. 125, § 1, p. 743.

In Virginia the rule prevails, Code (1873), Ch. 119, § 3. Prior to the enactment the question was fully considered in *Davis v. Rowe*, 6 Rand. 355, and the rule laid down as follows—whenever several persons succeed to the inheritance at the same time and are in equal de-

gree, the distribution should be *per capita*, but if part be more remote those who stand in the more remote degree shall take the share of their deceased parent.—This extended the spirit of the sixteenth section of the Act of 1785, then the law of Virginia, beyond the words therein employed, which were, “where the children of the intestate or his mother, brothers and sisters, or his grandmother, uncles and aunts, or any of his female lineal ancestors with the children of his deceased lineal ancestors, male and female, in the same degree come into partition,” etc. *Davis v. Rowe* was a case between nephews and the children of nieces. A. died leaving two nephews, sons of his deceased sister B., a niece, daughter of his deceased brother C., and eight grandnephews, sons of deceased children of B. The court held that the niece would take, not one-half of the estate as at common law, but one-fifth, in other words, that the representation should be brought up until equal degrees were reached, and then division should be made. In this decision, BROOKE, P., CARR and COALTER, JJ., concurred; GREEN and CABELL, JJ., dissented. This method of computation has been followed in Ohio, *Ewers v. Follin*, 9 Oh. St. 327, and in a case of lineal descent, *Dutoit v. Doyle*, 16 Oh. St. 400, and has also been followed in Missouri, *Copenhaver v. Copenhaver*, 78 Mo. 55; S. C., 9 Mo. App. 200. In these States the rule of distribution *per capita* to heirs in equal degree, and *per stirpes* to collateral heirs in unequal degree is established by statute; Missouri R. S. (1879), § 2165; Ohio, Act Mar. 14, R. S. (1884), § 41464–7, see *Ewers v. Follin*, 9 Oh. St. 327; as is also the case in New Jersey, Rev. St. (1877), p. 298, pl. 6; New York Rev. St. (Throop, 1882), Pt. 2, Ch. 2, §§ 1, 8, 9, pp. 2211, 2212; Texas Rev. St. (1879), Art. 1652, *Jones v. Barnett*, 30 Tex. 637; West Virginia Rev. St. (1879), Ch. 66, § 3; Arkansas, *Kelly's Heirs v. McGuire*, 15 Ark. 585; Indiana, *Blake v. Blake*, 85 Ind. 65; Georgia Code (1882), § 2448. The object of the rule is well expressed in *Houston v. Davidson*, 45 Ga. 574, by M'CAY, J., as follows: “The object of the rule is that those nearest of kin shall always get just the share they would have got if all with equal degree with them were living; it is therefore best carried out by holding that if all the brothers and sisters be dead at the death of the intestate, then the distribution is between the nephews and nieces *per capita*, and if any of them be dead leaving children, distribution is to be made as though the nephews and nieces were all alive, the children of the deceased nephews and nieces standing in the place of their parents.”

The rule thus adopted in so many States seems consonant with reason and with that, natural equity which has been declared to be equality, and, if any presumed intention is to be considered as arising from the fact that

a man has chosen to die intestate, it might well be supposed that he would wish all standing in an equal degree of nearness to him to receive an equal share of his estate. The rule, however, is not law in all States, and there are several in which the rule of inheritance *per stirpes* has been very rigidly adhered to. This was formerly the case in New York, although the extreme length to which the rule was carried was early noted and commented upon—in 1810, in *Jackson ex d. Roosevelt v. Thurman*, 6 Johns. 322, KENT, C. J., said: “The fifth rule or canon in our statute regulating descents (Laws 1, p. 46, Sess. 9, Ch. 12) has departed a little from the principles adhered to in the order of lineal descents and has carried to unusual length the doctrine of inheritance *per stirpes* or by representation. Thus if A. die seized of land and his nearest heirs are a brother and two nephews by a deceased brother, the two nephews must claim by representation to entitle them to a share of the estate with their uncle. But if A. die seized of land and his nearest heirs are a nephew by a brother deceased and two nephews by another brother deceased, in this case the claim is all shared in equal degree of consanguinity, being all nephews to the common ancestor, and might all well inherit equally or *per capita*; yet the statute makes them inherit *per stirpes* or such share as their parents respectively would have inherited if living, and of course one nephew would take one-half of the estate and the other two nephews the other half. The present is such a case and it is carrying the doctrine of inheritance *per stirpes* further than it is carried in the case of lineal descent and further than it was carried in the celebrated novel of Justinian (118), from which the statute of distribution was copied, but it is clearly the language and meaning of the statute.” As we have seen, the law in this respect has been altered in New York, but in North Carolina it is still the rule that collateral heirs, even if all of equal degree, take *per stirpes*. This was first held under the statute of 1808, in *Clement v. Cauble*, 2 Jones, Eq. 82, by BATTLE, J., and NASH, C. J., PEARSON, J., dissenting. After this decision a revision of the statutes took place, but the phraseology of the statute interpreted by the court was left unchanged and the statutory provision was incorporated in the revision as Ch. 38, Rule 3. That being the case, when the question came before the Supreme Court, in *Haynes v. Johnson*, 5 Jones Eq. 124, the doctrine of *Clement v. Cauble* was adhered to without dissent, and the same doctrine is held in *Cromartie v. Kemp*, 66 N. C. 382. In Kentucky the statutory provision is that if any or all of a class first entitled to inherit are dead, leaving descendants, such descendants shall take *per stirpes*, Gen. Stat. (Bul. & Fel. 1881), Ch. 31, § 2, p. 369. And in Maryland it is held that nephews and nieces will take *per stirpes*, *McComas v. Amos*, 29 Md. 132.

Another effect of the rule of representation is to cause the heir to take subject to advancements made to his parent and to his indebtedness to the estate of the decedent, and, therefore, where heirs of unequal degrees take, those of the more remote degree may properly have charged against their shares advancements to or indebtedness of their parent, *Earnest v. Earnest*, 5 Rawle, 213; *Levering v. Rittenhouse*, 4 Whart. 130; *Christy's Appeal*, 1 Grant, 369; *McConkey v. McConkey*, 9 Watts, 352; *Hughes's Appeal*, 57 Pa. St. 179; *Girard Life Ins. Co. v. Wilson*, Id. 182; but where the taking is directly from the decedent, such charge cannot be made; thus, as grandchildren, there being no children, do not take by representation, a grandchild taking under such circumstances is not chargeable with an advancement to his parent, *Person's Appeal*, 74 Pa. St. 121; and see *Skinner v. Wynne*, 2 Jones Eq. 42.

Requirement of Blood of First Purchaser.

V. The fifth canon of the common law is: On failure of lineal descendants or issue of the person last seized the inheritance shall descend to his collateral relations being of the blood of the first purchaser; subject to the preceding rules. Blacks. Com., Lib. 2, p. 220.

It is to be noted that at common law ascent of an inheritance was permissible where the ascendant was a collateral one, Co. Litt. 10 b; *Smith v. Gaines*, 35 N. J. 65.

In this country, this canon, so far as it requires blood of the first purchaser, has but a limited application, the tendency in many of the States being to regard only the immediate descent; in some, however, the old rule is maintained. Thus, in Pennsylvania the policy of the law has always been to keep real property in the line of the ancestor by whom it was brought into the family. This rule was established in *Bevan v. Taylor*, 7 S. & R. 397, which practically overruled *Walker v. Smith*, 3 Yeates, 480. DUNCAN, J., said: "After the most anxious deliberation, to me it is a clear intent written in capital letters in the Act of 1794 and the explanatory Act of 1797, that all who are not of the blood of the ancestor from whom the estate came are excluded from the inheritance; however remote in degree the descent may be, the lines in which the estate came are preserved *ad infinitum* and the blood of the ancestor runs through every clause of these Acts;" and see *Shippen v. Izard*, 1 S. & R. 226; *Clepper v. Liverpool*, 5 Watts, 113. In *Lewis v. Gorman*, 5 Pa. St. 164, land descended from the mother, who was the devisee of her father, it was held that the devise would not make the mother the purchaser from whom blood was to be taken. BELL, J., said: "It follows that Ann Thomas, the mother

of the intestate, is not the ancestor from whom the estate descended or by whom it was given. To find him we must go back to Peter Jones the grandfather, if not to Thomas Jones the great-grandfather. Between these and the plaintiff [a grandchild of the brother of Ann's maternal grandmother] there is no consanguinity and he is consequently excluded from any portion of the inheritance." The court also held that the Act of 1833 did not change the policy of the law in respect to blood. The same principle is to be found governing the case of *Grosvenor v. Fogg*, 81 Pa. St. 400, where A. having made a devise in fee to his wife, afterwards died; on the widow's death, it was held that she had no estate which was transmissible as from a new stock and that her child by another husband than A. could not take. Where a father died seized, leaving two children, one of whom afterwards died leaving the other his heir, who also died, it was held that a paternal uncle would take before the mother of the person last seized, for while she was of the blood of her child she was not of the blood of her husband, *Maffit v. Clark*, 6 W. & S. 258; and see *Roberts's Appeal*, 39 Pa. St. 417; *Hart's Appeal*, 8 Id. 32; *McWilliams v. Ross*, 46 Pa. St. 369. The limitation in blood is however to be confined to estates in fee, and, therefore, the life estate given, by the Act of 1833, § 3, to the parent of an intestate may be taken by a parent, although the estate came to the intestate from the line of the other parent, *Moyer v. Thomas*, 38 Pa. St. 426; the law was otherwise under the Act of Apr. 19, 1794, see *Shippen v. Izard*, 1 S. & R. 22, and *BELL, J.*, in *Lewis v. Gorman*, 5 Pa. St. 164, seemed to think that the Act of 1833 had made no difference in this respect; but in *Moyer v. Thomas*, *THOMPSON, J.*, in delivering the opinion of the court, commenting upon the Act of 1833, § 3, said: "There is no exclusion in this section on account of blood when the succession is to a life estate, as there was in the Act of 1794, §§ 5-7, 3 Sm. L. 146. Without attending closely to the wording of the two Acts, those of 1794 and 1833, I think Mr. Justice Bell was led into error in *Lewis v. Gorman*, 5 Barr, 164, in saying that 'the meaning of both Acts was the same.' It seems to be clear that the scope was greater in the former than in the latter in the particular suggested. I understand the law now to be that there is no exclusion where the interest is a *life* estate, Section three, Act 1833. . . . In the fifth section of the Act there is a provision for an estate of inheritance in the real estate of a deceased child in the parents or survivor of them. The qualification or limitation of that is to be found in the ninth section of the Act already quoted. It excludes only in cases where by the Act the *inheritance* is to pass, those, in that case, who are not of the blood of the ancestor or other relative from whom the real estate descended are not to succeed." In cases of inheritance beyond those provided

for in the statute of descent, the next of kin will take equally, irrespective of the blood of the first purchaser, Act Apr. 8, 1833, § 11.

The rule of requirement of the blood of the first purchaser to constitute heirship prevails in North Carolina, *Den ex d. Wetsiy v. Sawyer*, 1 Murph. 493; *Wilker son v. Bracken*, 2 Ired. L. 315, in the last cited case it was said that the descent to be looked to is not the immediate one, but that to find it it is necessary to go back to the person who originally brought the estate into the family. Half brothers and half sisters are within the rule, and, therefore, a father will take as against his own children, who are not of the blood of the first purchaser, *Little v. Buie*, 5 Jones Eq. 10.

Tendency to Regard Immediate Descent only.—Statutory Ancestral and Acquired Estates.

The prevailing tendency in the legislation upon the subject is to look only to the immediate descent, and the words "first purchaser" are not to be found in the statutes of the States wherein a distinction is made between the descent of estates which have descended, or have been given, to the intestate by a relative, and the descent of those which he has acquired, which estates we may for convenience call "ancestral" and "acquired" estates. We do not use the expression "purchased estate," because many estates which at common law would be held to have come by purchase, as an estate devised by an ancestor, are within the purview of various statutes considered as ancestral. The model of most of the distinctive legislation is to be found in the New York Revised Statutes, vol. i. p. 753, which provides for the descent of land in a specified way unless "the inheritance came to the intestate by descent, devise or gift from some one of his ancestors, in which case all who are not of the blood of that ancestor shall be excluded from such inheritance." In interpreting this statute, the New York courts have held that ancestor means the person, related by blood to the intestate, from whom the estate was immediately derived—hence where R. died, leaving land to his children, L. and P., L. died, and P. inherited L.'s share, on P.'s death it was held that his half-brother could inherit the land although he was not of the blood of R. for he was of the blood of L. who, for the purpose of descent under the statute, was to be regarded as the ancestor, *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Emanuel v. Ennis*, 48 N. Y. Sup. Ct. 430. It will be perceived that this is an interpretation of the word "ancestor" utterly discordant with the force given to the same word in much the same connection in the Pennsylvania statute. The same wide extent, *i. e.* one which embraces all kindred from whom an estate could be derived and from whom a gift or devise is made, is given to the word ancestor in other States, and in them also the imme-

diate descent only is looked to, *Cliver v. Sanders*, 8 Oh. St. 501; *Greenlee v. Davis*, 19 Ind. 60; *Murphy v. Henry*, 35 Id. 442 (overruling *Johnson v. Lybrook*, 16 Id. 473); *McMakin v. Michaels*, 23 Ind. 462; *Smith v. Smith*, Id. 202; *Coffman v. Bartsch*, 25 Id. 201; *Barnes v. Lloyd*, 37 Id. 523; *Lessee of Prickett v. Parker*, 3 Oh. St. 394; *Stretch v. Stretch*, 1 South. 182; *Morris v. Potter*, 10 R. I. 58; *Buckingham v. Jacques*, 37 Conn. 402. Thus in *Clark v. Shailer*, 46 Conn. 119 (the syllabus of the report of which case is misleading and incorrect), A. made a devise to his daughter B., who married C. and had by him two children, D. and E.—after B.'s death D. died and E. inherited from him, E. died, a minor, intestate and without issue, brothers or sisters or their representatives—it was held that C. could take, for the estate had lost its maternal ancestral character, and C. was of the blood of D. In *Gardner v. Collins*, 2 Pet. 58, STORY, J., considered the question when it was urged upon the court that under a provision as to blood, similar to the one above cited, in case of a descent to the intestate, the blood of the first purchaser should be regarded, and said: "We think then that in the case of a gift or devise the statute stops at the immediate donor or devisor, and ascends no higher for any blood. What reason is there to suppose that in the case of a descent there was a different legislative intention? . . . It has been said that the object was to preserve inheritance in the same family. To a limited extent this is true, that is so far as the Legislature has provided for such cases. No general declaration is made by the Legislature on the subject, and no preamble which discloses any leading intention exists. What the legislative intention was can be derived only from the words of the Act, and not from conjecture *aliunde*. The common law carries back in certain cases the descent to the first purchaser. But the common law canons of descent are overturned by the Statute of Descents of Rhode Island. How then can we resort to the common law to make up the supposed defects in the language of the statute? Here there is not a *casus omissus*; but a complete scheme of descents, and the only question is how much the provision carries out and saves from the operation of the general rule. No such words as the 'first purchaser' are to be found in the statute, though it is sufficiently technical in other respects, and what rights can this court possess to exchange the words in the statute for the words first purchaser when they are not equivalent in meaning?"

Under the view above taken a brother has been regarded as an ancestor, *Lessee of Prickett v. Parker*, 3 Oh. St. 394; but the meaning has in some States been more restricted, thus in Tennessee, land descended from a granduncle was held not be descended from an ancestor, *Brother v. Francisco*, 1 Heisk. 511; and in the *Wills of John & Jos. Miller*, 2 Lea,

54, land which came to a grandchild from his maternal grandfather, and on the grandchild's decease was inherited by a sister of the half blood was held not ancestral; but land given to the intestate by a paternal uncle was held ancestral in *Oliver v. Vance*, 34 Ark. 564, but even where a liberal interpretation of the rule is given, the courts have stopped short of considering a husband the ancestor of his wife, *McClanahan v. Trafford*, 46 Ind. 410, and a devise to a wife by a relative of the husband will not be regarded as a devise from an ancestor, *Penn v. Cox*, 16 Oh. 30.

It is to be noted that a gift, or generally speaking, a devise from one who might be an ancestor, in the statutory sense, will be held to introduce the limitation of blood, *Oliver v. Vance*, 34 Ark. 564; and see *Felton v. Billups*, 2 D. & B. Law, 308; and so when a father has advanced money for the purchase of property, and taken title in the name of his son, *Galloway v. Robinson*, 19 Ark. 396; but in another case where A. received by devise from his maternal grandfather lands in Decatur County, and A.'s father took up lands in Tipton County in A.'s name, in consideration whereof A. conveyed his Decatur lands to his father, it was held that the Tipton lands would not be considered as maternal ancestral, and that the rule that equity would follow the consideration was not applicable to the canons of descent, *Armington v. Armington*, 28 Ind. 74; and where A. paid for certain lands and then died, and B. took title to the said lands in trust for A.'s daughter, and afterwards executed a deed to her, it was held that the daughter had acquired the land by purchase, and hence that on her death without issue her brothers of the half blood would take to the exclusion of her paternal uncle, *Nicholson v. Halsey*, 1 Johns. Ch. 417.

Blood of Ancestor includes Half Blood.

The blood of the ancestor includes the half blood, *Beebee v. Griffing*, 14 N. Y. 235; *Prichitt v. Kirkman*, 2 Tenn. Ch. 390; *Hart's Appeal*, 8 Pa. St. 32; *Cutter v. Waddingham*, 22 Mo. 206; *Delaplaine v. Jones*, 3 Hals. 340; *Cliver v. Sanders*, 8 Oh. St. 501. And if the collateral nearest to the intestate has the blood of the ancestor in his veins he will inherit in preference to a more remote relative who if the relationship were taken solely through the blood of the ancestor would be nearer than the first-mentioned relative. This is well illustrated by a case in New Jersey, *Speer v. Miller*, 37 N. J. Eq. 492; in that case Henry Speer died, leaving as his heir his daughter Julia, whose mother was Henry's cousin Liba. Julia died, leaving the plaintiffs, her first cousins on the father's side, being children of his brother John, and maternal uncles and aunts of the defendants. If the degrees were taken solely by the blood of Henry, the

ancestor, the plaintiffs would have stood in the fourth degree, thus: Julia to Henry, Henry to his mother, the mother to John, John to the plaintiffs, while the defendants would have stood in the fifth, thus: Julia to Henry, Henry to his mother, his mother to her father Henry Miller, Henry Miller to his son Charles Miller, and Charles Miller to the defendants, but if proximity to Julia through her mother, cousin of her father and therefore of his blood, were taken they would have stood in the third degree, viz., Julia to Liba, Liba to Charles Miller, Charles Miller to the defendants. The Chancellor held that the first method of computation should be followed, and made a decree for the plaintiffs, this was reversed on appeal by the Court of Errors and Appeals, N. J. Eq., *Miller v. Speer*, 38 N. J. Eq. 567, DIXON, J., in the course of the opinion said: "Are the appellants of the blood of the intestate father within the meaning of this provision? If they are not, they are excluded; otherwise they inherit. . . . But the respondents insist that the section under review [§ 6 of the Statute of Descents], taken altogether signifies that when lands have come to the intestate by descent, devise or gift from an ancestor, those persons shall inherit who are related in the nearest degree of consanguinity by virtue of the blood of such ancestor, and this construction was adopted in the court below. This view is said to be commended by the principles of natural right which should prefer the nearest in blood to the ancestor. But when the descent is to be cast among the more distant relatives provided for in this section, I think the claims of nature are but slight, and in many instances the increased value which the estate has received in the hands of the person last seized will entitle him to nearer kindred rather than ancestors to even these claims. There is nothing in such principles sufficiently decisive to disturb the simple exposition of this statute. . . . The blood of the ancestor merely marks the class in which the heirs are to be found, but the person dying seized is the *propositus* whose nearest kindred in that class are *the heirs*." And see *Brower v. Hunt*, 18 Oh. St. 311. But while the above is a correct statement of the law, yet a person cannot make himself heir to the intestate by showing himself next of kin through blood which is not ancestral, although he have ancestral blood in his veins. In other words, he cannot fix his kinship by reference to blood entirely outside of that of the ancestor. This is illustrated by the *Appeal of John B. Ranck and others*, 113 Pa. St. 98. Henry Rhoads had several children, amongst others Margaret and John, the perquisitor. John had a son John, who married Nancy Ranck, and had a son Amos. Margaret had several children, including one, Lucy, who married Jacob Ranck, a brother of Nancy. After the death of his parents and of Lucy and

Jacob Ranck, Amos died intestate, seized of property devised to him by John the perquisitor. The property was claimed by the surviving children of Margaret, and by the children of Lucy. The first set, whose relation to the intestate was derived solely through the perquisitor's blood, stood in the fifth degree to him; the second set, their relation being derived in the same way, were in the sixth; but taking not the Rhoads but the Ranck blood they were in the fourth degree, viz: Amos to Nancy Ranck, Nancy to John Ranck (the father), John to Lucy, Lucy to her children. It will be seen that the last line of derivation did not touch the blood of John the perquisitor. The court held that the first line took. This case, it will be observed, is not in conflict with the New Jersey case, for there the blood of the perquisitor was relied on by each class to make the degree of kinship, there was only a difference in amount; here a blood strange to the perquisitor was sought to be introduced to make the degree.

Statutory Ancestral Blood.

A distinction is to be observed amongst the statutes of inheritance of different States; in some the blood of the ancestor is merely *preferred*, and the relatives not of that blood are merely postponed and may take after the extinction of the ancestral blood, *Den d. University of North Carolina v. Brown*, 1 Ired. L. 387; *Indiana*, R. S. (1881), § 2472; *Ohio*, Rev. St. (1882), § 4158; *Tennessee*, Code (M. & V. 1884), § 3268; *Beaumont v. Irwin*, 2 Sneed, 291; *Connecticut*, Gen. St. (1875), Tit. 18, Ch. 11, Art. II. § 8; *Rhode Island*, Pub. St. (1882), Ch. 187, § 6, p. 490; *Cole v. Batley*, 2 Curt. 563; *Tillinghast v. Coggeshall*, 7 R. I. 383.

And in some States the preference is very limited; thus in Tennessee it is held that where half-sisters or brothers exist the exhaustion of blood need only be in the degree of brothers and sisters and their descendants, before the half-sisters and brothers are allowed to take, *Nesbit v. Bryan*, 1 Swan, 468; and the mother will take a paternal inheritance in default of brothers and sisters, and father, *Towl v. Rains*, 2 Heisk. 355; and in *Chaney v. Barker*, 3 Baxt. 424, Chaney, a widower with two children, Ella and Laura, married Emily Barker, by whom he had a son James, Emily died and James inherited her land, James died, it was held that his half-sister inherited from him in preference to his maternal aunt. NICHOLSON, C. J., said: "By this construction the land passes entirely out of the blood of the ancestor from whom it was derived, but such is the statute, and so we must hold."

Statutory Requirement of Ancestral Blood.

In other States the possession of ancestral blood is a requirement. See Pennsylvania, Act April 8, 1833, § 9; Arkansas, Rev. St. (1884), § 2522; *Kelly's Heirs v. McGuire's Heirs*, 15 Ark. 555; *Campbell v. Ware*, 27 Id. 65; *Beard v. Mosely*, 30 Id. 517; *Scull v. Vaugine*, 15 Id. 695; *Byrd v. Lipscomb*, 20 Id. 19; *Galloway v. Robinson*, 19 Id. 396; *Oliver v. Vance*, 34 Id. 564; Alabama, Code (1876), § 2256; Nevada, Comp. Stat. (1873), § 797; Nebraska, Gen. Stat. (1863), Ch. 17, § 33; California, Civil Code, § 6394; Michigan, Annot. Stat. (Howell, 1882), § 5776 a; Wisconsin, R. S. (1878), § 2272; Minnesota, Gen. Laws (1878), Ch. 46, § 7; *Den d. Delaplaine v. Jones*, 3 Hals. 340; *Banta v. Demarest*, 24 N. J. Law, 431; New York, R. S. (1882), Pt. 2, Ch. 2, § 15.

Acquired Estate.

Where an estate is not an ancestral one but a new acquisition of the intestate there is, of course, no opportunity for the operation of the rule requiring ancestral blood, *Van Sickle v. Gibson*, 40 Mich. 170. A new acquisition has been defined to be one which the intestate acquired by his exertions and industry, or from the will or deed of a stranger, *Brewster v. Benedict*, 14 Oh. 385. Where a wife takes by devise from her husband, she takes as a purchaser and becomes a new stirps, *Opdyke's Appeal*, 49 Pa. St. 373; *Culbertson v. Duly*, 7 W. & S. 195; and so where land is devised to be sold and the donee, though a descendant of the testator, elects to take the land as land, *Burr v. Sim*, 1 Whart. 252; *Simpson v. Kelso*, 8 Watts, 252; and, in the absence of a statute, any devise, unless it be to an heir of the exact estate he would have taken as heir (see p. 450), will make an estate non-ancestral, taking by devise being a recognized form of purchase, and it was so held in *Hall v. Jacobs*, 4 H. & J. 245, and *Ramsey v. Ramsey*, 7 Ind. 607, and, therefore, to meet this objection the statutes of all the States, except Maryland, in which ancestral blood is required or preferred in inheritance, specify devise and gift from an ancestor as means whereby, as well as by descent, an ancestral character may be impressed upon an inheritance.

Want of Distinction between Ancestral and Acquired Estate.

In some States there is no distinction between the descent of estates acquired and those inherited by an intestate, *Doe d. Hickey v. Gilbert Deloach*, 1 How. (Miss.) 32; *Peacock v. Smart*, 17 Mo. 402; so formerly in Alabama, *Deloney v. Walker*, 9 Port. 497; *Hitchcock v. Smith*, 3 S. & P. 29.

Ancestral Blood Required in Certain Cases of Inheritance from Minor.

In some States there are especial enactments applying the rule of ancestral blood to the case of inheritance from an unmarried minor child, dying without issue, see *post*, California, Connecticut, Florida, Kentucky, Maine, Virginia, and West Virginia; and in some others there is an implied requirement, derived from an enactment that such inheritance must be by the brothers and sisters of the minor decedent, see statutes of Michigan, Minnesota, Nebraska, Nevada, Oregon, Wisconsin; and in such cases to fix the status of the estate the descent must be counted from the parent, *Perkins v. Simonds*, 28 Wisc. 90; *Nash v. Cutler*, 16 Pick. 499; *McAfee v. Gilmore*, 4 N. H. 391.

Descent between Brothers and Sisters.

One form of collateral inheritance is direct and immediate, namely, that between brothers and sisters, *Barnitz v. Casey*, 7 Cr. 456; *McGregor v. Comstock*, 3 N. Y. 408; *McCarthy v. Marsh*, 5 Id. 263, but where the heritable blood is derived through or from a parent, a descent will be governed even in this case by a statute regulating the descent of ancestral estates, *Stewart's Lessee v. Jones*, 8 G. & J. 1. And under the Kansas law of descents, where there is no especial provision for a descent to brothers and sisters, they take, not directly, but as representing the parents, Comp. Law (Dassler, 1885), Ch. 33, § 21, *McKinney v. Stewart*, 5 Kan. 384.

One effect of the directness of descent is that a parent cannot by formally disinheriting one child and leaving the estate to his or her brother, prevent the estate from passing on that brother's death without issue to the disinherited child, for he does not have to claim through the disinheriting father; thus, in *Lash v. Lash*, 57 Iowa, 88, a father died, having made a will cutting off his daughter and making a devise to his son, afterwards his son died, it was held that the daughter, or her representatives, would take the land which had descended to the son, notwithstanding the paternal will.

Method of Computation of Kinship.

VI. The sixth canon of the common law is, that the collateral heir of the person last seized must be his next of kin of the whole blood, Blackst. Com., Lib. 2, p. 224. The consideration of this canon naturally divides itself into two branches; the first has regard to the method of computing nearness of kin, the second has regard to the exclusion of the half blood.

Collateral Heir must be next of Kin of whole blood of Person last Seized.

As to the first, the rule which generally prevails is the method of computation of the civil law, by which each generation from the *propositus* to the common ancestor, and from him to the relative, excluding the *propositus* and including the relative, was counted, the ancestor being counted but once, *Taylor v. Bray*, 32 N. J. L. 182; *Schenck v. Vail*, 24 N. J. Eq. 538; *Smith v. Gaines*, 35 Id. 65; *Hillhouse v. Chester*, 3 Day, 166; *McDowell v. Addams*, 45 Pa. St. 430; *Shaffer v. Nail*, 2 Brev. 160; *Bennett v. Toler*, 15 Gratt. 625; *Mayo v. Boyd*, 3 Mass. 13; *Hurtin v. Proal*, 3 Bradf. 414; *Pierce v. Pierce*, 14 R. I. 514; *Hays v. Thomas*, Breese, 136; *Martindale v. Kendrick*, 4 G. Gr. 307; *Ryan v. Andrews*, 21 Mich. 234; *McCracken v. Rogers*, 6 Wisc. 278; *Bruce v. Baker*, 1 Wils. (Ind.) 462; *Cloud v. Bruce*, 61 Ind. 171; and has been adopted by statute in Massachusetts, Pub. St. (1882), Ch. 125, § 2, p. 743; Michigan Annot. Stat. (Howell, 1882), § 5776 *a*; Vermont Rev. Laws (1880), § 2231; Minnesota, Gen. Laws (1878), Ch. 46, § 7; Mississippi, Rev. Code (1880), § 1271; Nebraska, Comp. St. (1885), Ch. 23, § 33, p. 289; Nevada, Rev. Stat. (1873), § 797; Oregon, Gen. Laws (1872), Misc. Laws, Ch. 10, Tit. 3, § 6, p. 549; South Carolina, Rev. Stat. (1882), § 1845; Wisconsin, Rev. St. (1878), §§ 2270.

In California, the civil law computation is adopted, though not *eo nomine*, Civil Code, §§ 6389–6393.

In Georgia, for more remote degrees, the canon law, as enforced in England prior to July 4, 1776, is adopted, and uncles and aunts take with first cousins, Code (1882), § 2484.

In North Carolina the canon law is adhered to, Code (1883), § 1281 (6); *Gillespie v. Foy*, 5 Ired. Eq. 280, and so in Maryland, Code (1878), Art. 48, § 17.

Under the civil law, uncles and aunts are in the same degree with nephews and nieces, *Hurtin v. Proal*, 3 Bradf. 414; for, while, owing to the doctrine of direct descent, brothers and sisters are preferred to grandparents, this tendency does not go so far as to prefer the children of brothers and sisters to those of grandparents, *Id.*; and greatuncles and aunts are in the same degree with first cousins, *Smith v. Gaines*, 35 N. J. Eq. 65; uncles and aunts are nearer than cousins, *Speer v. Miller*, 37 N. J. Eq. 492; *Smith v. Gaines*, *supra*; grandparents are one degree nearer than uncles and aunts, *Ryan v. Andrews*, 21 Mich. 229; *Kelsey v. Hardy*, 20 N. H. 479; *Kirkendall's Appeal*, 43 Wisc. 167; *Barger v. Hobbs*, 67 Ill. 592; *Bassil v. Loffer*, 38 Iowa, 451; *Cables v. Prescott*, 67 Me. 582; *Cole*

v. *Batley*, 2 Curt. 562; *Phillips v. Peleet*, 35 Ala. 696; to this rule there is an exception to be found in Ohio, where the policy of the law, to prefer in descent the brothers and sisters to a parent, has been carried so far in the matter of an ancestral estate as to prefer the uncles and aunts to the grandfather; in *Curren v. Taylor*, 19 Oh. 36, George Arter gave land to his son George, who died, leaving an infant, an only child, to whom the land descended and who died, it was urged that under the statute then in force in Ohio, viz: "If there be no brothers or sisters of the intestate or their legal representatives the estate shall pass to the next of kin to the intestate of the blood of the ancestor from whom the estate came," that George Arter would inherit from his grandson, but the court in an opinion, delivered by **AVERY, J.**, said: "It has been the settled policy of this State in its laws of descent to direct the property of a deceased brother to pass to the brothers and sisters who survive him, to hold them in this respect as nearer than the father, even in a case where all the property had come by gift directly from him. If George Arter, the son, had died without a child, the estate now in controversy would, under the statute we are now considering, have passed to his brothers and sisters, and not to his father. . . . If then this estate would have been properly settled upon the brothers and sisters of George Arter, had he died without children, we cannot see a sufficient reason for diverting it because it has chanced to rest for a time in his infant son. We think that by a proper interpretation of the statute in question the brothers and sisters of the intestate's father, and not the grandfather, should take the inheritance."

Inheritance by Half Blood.

As to the second branch—the harsh rule of the common law, whereby the half blood is entirely excluded from the inheritance, is not the law in the United States. In some States a preference is given to the whole blood in the amount to be taken, the collateral of the half blood taking only one-half of the portion given to the whole blood of equal degree when the whole and half bloods take together, and where the half blood takes with ascendants the latter being given double portions, Virginia, Code (1873), Ch. 119, § 2, p. 917; *Davis v. Rowe*, 6 Rand. 355; West Virginia, R. S. (1878), Ch. 66, § 2; Colorado, Gen. St. (1883), § 1041; Missouri, R. S. (1879), § 2164; Louisiana, Code (1875), § 913; Florida, McClell. Dig. Ch. 92, § 4, p. 469; Kentucky, Rev. St. (Bul. & Fel. 1881), Ch. 31, § 3, p. 370; *Petty v. Malier*, 15 B. Mon. 591; this applies in the case of descendants from an infant, *Talbott's Heirs v. Talbott's Heirs*, 17 B. Mon. 1, and the mother will take a double portion, *Mitner v. Calvert*, 1 Metc. (Ky.)

472; in Texas, the half blood take half portions when taking with the full blood, but when they take with ascendants only, they take full portions, the ascendants taking double portions, Tex. R. S. (1879), § 1648; *King v. Marlow*, 17 Tex. 177.

In ancestral estates, in those States where ancestral blood is required, a discrimination is made against the half blood which is not of the blood of the ancestor, see *Childress v. Cutter*, 16 Mo. 24; *Den Lloyd v. Urison*, Penning. 154; *Den ex. d. Pierson v. De Hart*, Id. 363; *Den d. Delaplaine v. Jones*, 3 Hals. 340. In Alabama, it is to be noted that the exclusion even of non-ancestral half blood is only as against the whole blood of the same degree, Code (1876), § 2256.

In some States, even with reference to acquired estates, the half blood is postponed, Ohio, R. S. (1884), § 4159; in Connecticut, Act (1885), Ch. 110, § 200; Mississippi, Code (1880), § 1271; *Fatheree v. Fatheree*, Walk. 311; *Hulme v. Montgomery*, 31 Miss. 105; and the representatives of the brothers and sisters of the whole blood will take before brothers and sisters of the half-blood, *Scott v. Terry*, 37 Id. 65. In South Carolina, while brothers and sisters of the whole blood exclude brothers and sisters of the half blood, their representatives do not, Gen. Stat. (1882), § 1845.

Generally speaking, however, except so far as the general statement is affected by the foregoing, and in some particular cases, to be noted hereafter, the half blood is not discriminated against and will share equally with the whole blood of the same degree, *McCracken v. Rogers*, 6 Wisc. 278; *Hitchcock v. Smith*, 3 S. & P. 29; *Baker v. Heiskell*, 1 Cold. 641; *Brown v. Brown*, 1 Chip. 362; *Doe d. Moore v. Abernathy*, 7 Blackf. 442; *Lowe v. Maccubbin*, 1 H. & J. 550; *Doe d. Sheppard*, 3 Murph. 333; *Nicholl v. Dupree*, 7 Yerg. 415; *Den d. Burgwyn v. Devereux*, 1 Ired. L. 583; *Ross v. Toms*, 2 Hawks, 9; *Bell v. Dozier*, 1 Dev. 333; *Doe d. Pritchard v. Turner*, 2 Hawks, 435; *Larrabee v. Tucker*, 116 Mass. 562; *Prichitt v. Kirkman*, 2 Tenn. Ch. 390; *Danner v. Shissler*, 31 Pa. St. 289; *Simpson v. Hall*, 4 S. & R. 337; *Estate of Eliza T. Davis*, 14 Phila. 256; Massachusetts, Pub. St. (1882), Ch. 125, § 2, p. 743; Vermont, Rev. L. (1880), § 2231; Arkansas, Dig. (1884), § 2533; California, Civil Code, § 6394; Illinois, Rev. St. (1883), Ch. 39, art. 1, § 1; Maine, Rev. St. (1883), Ch. 75, § 2; Nebraska, Comp. St. (1885), Ch. 23, § 33; Nevada, Rev. St. (1873), § 797; Maryland, Rev. Code, art. 47, § 26; Kansas, Com. St. (Dassler, 1885), § 2267.

The term brothers and sisters used in a statute will include brothers and sisters of the half blood, *White v. White*, 19 Oh. 531; and, as we have seen, "blood" used generally, includes the half blood.

In the Louisiana Code there is an express provision preferring the brothers and sisters of the whole blood, but this is said to be an *exceptio juris*, and, in more remote relationship, the degree alone is looked to irrespective of the quantity of the blood, *Pearson v. Grice*, 6 La. Ann. 233.

In Pennsylvania, there is an express postponement of brothers and sisters of the half blood to brothers and sisters of the whole blood and to parents, even when the half blood is that of the ancestor, *Stark v. Stark*, 55 Pa. St. 62, but the half blood brothers and sisters will inherit before relatives of the whole blood of more remote degree, *Baker v. Chalfant*, 5 Whart. 477. In New Jersey and Mississippi the half blood brothers and sisters take after the parents. In Georgia, the paternal half blood will not take with the whole blood; if there be no brothers or sisters of the whole or paternal half blood, the maternal half blood may take; after the degree of grandchild of a brother or sister, there is no distinction of blood, Code (1882), § 2484, sub. 5, 7. In Delaware, brothers and sisters of the whole are preferred to like kindred of the half blood, Rev. Code (1874), Ch. 85, § 1.

The rule excluding the half blood which is not of the ancestor is applied with manifest propriety to the case of inheritance from a minor, where special statutory provision is made for such inheritance, *Crowell v. Clough*, 23 N. H. 207; *Clark v. Pickering*, 16 Id. 286, but where the half blood is of the blood of the parent from which the estate came it will exclude the other parent, *Clay v. Cousins*, 1 T. B. M. 75.

Preference of the Male Stock in Collateral Inheritance.

VII. The seventh canon of the common law is that in collateral inheritances the male stocks shall be preferred to the female, except where the lands have in fact descended from a female.

This is not the rule in the United States, see *McCracken v. Rogers*, 6 Wisc. 278; *Bailey v. Ross*, 32 N. J. Eq. 544; in none of them is it required that the paternal stock shall be exhausted before heirs are to be sought in the maternal line—in some States a modified preference, arising from the preference of lineal paternal ancestors, is given to males over females, see Maryland, p. 471; Rhode Island, p. 476; Texas, p. 478; but the general rule is that of perfect equality among those of the same degree, and in some States provision is made for an equal division between the two lines, paternal and maternal, in cases where ancestral blood is not required, with a substitution of an existing for a defunct line, see *post*, Florida, p. 467; Indiana, 468; Iowa, 469; Kansas, 469; Kentucky, 469; Louisiana, 469; Rhode Island, 476-7; Virginia, 478; West Virginia, 479.

Posthumous Children.

A posthumous child will take as an heir and will stand in the same position as a child living at the parent's death, New Jersey, Jan. 24, 1799, Georgia, Code, § 2484, subd. 4; Illinois, R. S. Ch. 39, § 9, p. 440; Indiana, R. S. 2467; Kansas, Comp. St. § 2268; Act of 13 March, 1789, § 8; South Carolina, *Talbird v. Executors of Bell*, 1 Desau. 592; Alabama, Code, § 2257; *Bishop's Heirs v. Hampton*, 11 Ala. 254; Arkansas Dig. § 2523; Colorado R. S. § 1040; Maryland, Rev. Code, art. 47, § 25; Kentucky, Gen. St. Ch. 31, § 7, p. 370; Massachusetts, Pub. St. Ch. 125, § 6; Michigan, Annot. St. § 5784; Minnesota, Gen. L. Ch. 46, § 15; Nebraska, Comp. St. Ch. 23, § 41; Virginia, Code, Ch. 119, § 8; West Virginia, R. S. Ch. 66, § 8; Tennessee, Code, § 3275, and the use of the word "leave" with reference to issue—as die and leave issue—in a statute of inheritance will not deprive the posthumous child of his right as heir, *Pearson v. Carlton*, 18 S. C. 47. In some States, the time within which the posthumous child must be born is fixed by law at ten months, North Carolina, Code, § 1281, Rule 7; *Rutherford v. Green*, 2 Ired. Eq. 121; Virginia, West Virginia, Tennessee, *supra*, but this limitation is, of course, only applicable to children of the intestate, and where posthumous relatives of any other kind can by law inherit they may be born at any time.

The right of posthumous inheritance is generally limited to the child or descendant of the intestate, and there is a statutory limitation to children, with a provision that no right of inheritance shall vest in any other person not born at the death of the intestate, in Alabama, Arkansas, Colorado, *supra*; Missouri, R. S. § 2162; and to descendants, in Texas, R. S. Art. 1650; Ohio, R. S. § 4179; Maryland, R. C. Art. 47, § 25; Rhode Island, Pub. St. Ch. 187, § 3, p. 490. The provision in the New York statute is in terms more liberal; it is that posthumous descendants and relatives shall inherit as if born, R. S. Pt. 2, Ch. 2, § 18. It should of course be borne in mind that the right of the posthumous child which attaches upon its conception is but an inchoate one and must be completed by birth alive, after such a period of foetal existence that continued life may be reasonably expected—a premature birth will not complete the right, *Harper v. Archer*, 4 Sm. & Mar. 99; where, therefore, a child is born within six months after conception, any one claiming any right through, or on account, of that child must prove that it lived after birth, as the presumption is against its being born alive under such circumstances, *Marsellis v. Thalhimer*, 2 Paige, Ch. 38.

The inheritance of a posthumous child is not liable to be divested by a sale of the property in the time between the death of his ancestor and his

own birth, *Massie v. Hiatt's Adm'r*, 82 Ky. 314, although the sale be upon the petition of the guardian of infant heirs already born, Id.

Irregular Inheritance—Bastardy.

Having exhausted what may be called the regular line of descent, we now come to the irregular or exceptional cases of descent—and first we shall consider inheritance by and from bastards. The bastard is in law, says LITTLETON, “*quasi nullius filius*, because he cannot be heir to any,” Litt., Sec. 188, and see Doct. and Stud., Dial. 1, Ch. 7; and he could at common law have no heirs save the issue of his body, Co. Litt., 3 b; for he had no heritable blood given him, *Stover v. Boswell*, 3 Dana, 232; *Bent's Administrator v. St. Vrain*, 30 Mo. 268, and he had not even any such relation to his mother as the law, for the purposes of inheritance, could recognize, *Cooley v. Dewey*, 4 Pick. 93.

The law in this respect has been materially altered in the United States, Connecticut took the lead in the liberalization of the law with reference to inheritance by illegitimates, and her courts very early declared that the common law of bastards was not the law of Connecticut, but that natural children by the same mother might be heirs to each other, *Brown v. Dye*, 2 Root, 280; this decision was followed by another, the principle of which was involved in the earlier case, which held that the bastard might inherit from his mother, *Heath v. White*, 5 Conn. 228; the law therefore having recognized, and, so far as we have been able to discover, without the aid of a statute, both lineal and collateral inheritance by a bastard, we are not surprised to find the position that a bastard has heritable blood, both lineal and collateral, held as law in Connecticut, *Dickinson's Appeal*, 42 Conn. 491.

Statutory Inheritance by Bastards from Mother—Effect of as to Maternal Collaterals.

The matter has been in other States regulated by statute. The course of legislation has in all of the States been in the direction of liberalization, but all have not gone to the same extent. The right of inheritance from the mother is recognized in all States. By some statutes it is provided that bastards may inherit or transmit inheritance on the part of their mother as though legitimate, Virginia, Code, Ch. 19, § 5; *Bennett v. Toler*, 15 Gratt. 588; *Garland v. Harrison*, 8 Leigh, 368; *Hepburn v. Dundas*, 13 Gratt. 219; Kentucky, Rev. St. (Bul. & Fel. 1881) Ch. 31, § 5; Indiana, R. S. (1881), § 2474; West Virginia, R. S. (1879), Ch. 66, § 5; Missouri, R. S. (1879), § 2169; Florida, Dig. (McClell.),

Ch. 92, § 8, p. 470; Rhode Island, Pub. St. (1882), Ch. 159; *Briggs v. Greene*, 10 R. I. 495.

Legislation of the above character will not create heritable blood generally between the bastard and his maternal collateral relatives, hence, generally speaking, the bastard will be limited to taking in cases of lineal ascent or descent, *Allen v. Ramsey's Heirs*, 1 Metc. (Ky.) 635; he cannot take through a deceased mother collaterally, *Id.*; *Scroggin v. Allan*, 2 Dana, 363; *Remmington v. Lewis*, 8 B. Mon. 606; *Bent's Administrator v. St. Vrain*, 30 Mo. 268; this conclusion in Ohio under the former statute—the present is more liberal—rested on the narrow interpretation given to the words “on the part of the mother,” in the statute, the Supreme Court, in *Little v. Lake*, 8 Oh. 289, holding that *ex parte materna* had a meaning different from and opposed to *ex linea materna*, and imported lineal descendants; this ruling was questioned by RANNEY, J., in *Lewis v. Eutsler*, 4 Oh. St. 354, but a similar one was made in *Gibson v. McNeely*, 11 Oh. St. 131, and the interpretation was upheld in *Hawkins v. Jones*, 19 Oh. St. 22, where the court held that the wife of a bastard deceased without issue, and not the legitimate descendant of his mother, took his land. The Missouri statute interpreted in *Bent's Administrator v. St. Vrain*, *supra*, was in the same words as the Ohio statute and was held to have the same effect upon the inheritance of collaterals, and the interpretation also received some support from a decision of the Supreme Court of Vermont upon the statute of that State providing for the transmission of inheritance on the part of the mother. That court, in *Burlington v. Fosby*, 6 Vt. 83, held that one illegitimate child could inherit from another of the same mother; in *Bacon v. McBride*, 32 Vt. 585, it was asked to hold that the bastard could inherit also from a legitimate child of the same mother, but the court, speaking by REDFIELD, C. J., said: “This [*i. e.*, the expression in the statute] strictly extends no further than to inheritance between the mother and the child. It was by construction in the case of *Burlington v. Fosby*, extended to create the relation of brother and sister between illegitimate children of the same mother. We are now asked to extend it so as to create the same relation between illegitimate children and legitimate children of the same mother. That is certainly going a very great way beyond the statute. It will enable the mother by illicit means to multiply at will the heirs to the property of the legitimate children, who may thus deprive them, in case of the decease of their brother and sister, of the enjoyment of the property derived from their own father. This is certainly something not contemplated by the court in the case of *Burlington v. Fosby*, and entirely

beyond the purview of the statute. In fact the decision in *Burlington v. Fosby* went beyond the statute."

The right of bastards of the same mother to inherit from each other is recognized, see *Lessee of Brown v. Blougher*, 14 Pet. 178; *Rogers v. Weller*, 5 Biss. 166; *Estate of Magee*, 63 Cal. 414; Maryland, Rev. Code (1873), Art. 47, § 30. In Virginia, it is held that they inherit as of the half blood, and therefore take half portions, *Garland v. Harrison*, 8 Leigh, 368; and this was formerly the law in Mississippi, see Act Feb. 23, 1846. But the right to inherit from legitimate children of the same mother is not admitted, even in some States where the legitimate child can inherit from his bastard brother or sister.

It is expressly provided in some States, where the heirship of the bastard to his mother is recognized, that he shall not be allowed to claim as representing her either collaterally or lineally, Michigan, Revised Stat. (Howells, 1882), § 5773a; Wisconsin, Rev. St. (1878), § 2274; Minnesota, Gen. Laws (1878), Ch. 46, § 5; Nebraska, Comp. St. (1885), Ch. 23, § 31; California, Civil Code, par. 6387; Oregon, Gen. Laws, Miscell. Laws, Ch. 10, Tit. 3, § 4; Nevada (1873), § 795.

In Mississippi, it is provided that bastards shall inherit from their mother and her other children and kindred the children of illegitimates, from the brothers and sisters of their father and mother whether legitimate or illegitimate, and from their grandparents, but not from any ancestor or collateral kindred if there be legitimate heirs in the same degree, Rev. Code (1880), § 1275.

The present Ohio statute provides that bastards may inherit and transmit inheritance from and to the mother and from and to those from whom she may inherit or to whom she may transmit inheritance, Rev. Stat. (1884), § 4174.

In Arkansas, a bastard may inherit and transmit inheritance from and to any and all collaterals legitimate or illegitimate, Dig. (1884), § 2524, *Gregley v. Jackson*, 38 Ark. 487.

In Texas, the statute runs that a bastard may inherit from and through the mother and transmit the inheritance, R. S. (1879), Tit. 33, Art. 1657, p. 248.

In Massachusetts, under the Rev. St. c. 61, § 2, the bastard could not take as a representative of his mother either lineally or collaterally; the law in this respect was not altered by the Gen. St. but remained the same in c. 91, § 2, see *Pratt v. Atwood*, 108 Mass. 40; *Kent v. Barker*, 2 Gray, 535, and the statutory provision, that an illegitimate child should be considered as heir to his mother and should inherit her estate in like manner as if he had been born in lawful wedlock, was held not to cover a grand-

child, *Curtis v. Hewins*, 11 Metc. 294; but by Pub. Stat. (1882), Ch. 125, § 3, it is provided that an illegitimate child shall be heir to his mother and of any maternal ancestor, and the lawful issue of any illegitimate shall represent such person and take by descent any estate which such person would have taken if living. See *Pratt v. Atwood, supra*. This Act gives lineal representation but does not seem to render the bastard his mother's representative as to collateral inheritance, *Haraden v. Larabee*, 113 Mass. 430.

In Illinois, a bastard can inherit from his mother and transmit his property to his mother and her children, Act Feb. 12, 1853, P. L. 255; and he can take from his illegitimate brothers and sisters, *Rogers v. Weller*, 5 Biss. 166; prior to 1872, the bastard could take only in case his mother was unmarried, *Miller v. Williams*, 66 Ill. 91; *Blacklaws v. Milne*, 82 Id. 505; but the law, in that respect, is now changed and he is heir of any person from whom his mother might have taken if living, R. S. (1883), Ch. 39, Art. 2, § 2.

In Iowa, illegitimates take from the mother, Rev. St. (1860), § 2441; *Crane v. Crane*, 31 Iowa, 296; and represent her so as to take an inheritance which would have vested in her but for her death, *McGuire v. Brown*, 41 Iowa, 650.

Representation is also recognized in Indiana, Rev. St. (1881), § 2474; and in Georgia, where the provision is that illegitimates may inherit from their mother, irrespective of the existence of legitimate children, and from each other, Code (1882), §§ 1791, 1792, 1800, and representation will extend amongst collaterals to illegitimates, *Houston v. Davidson*, 45 Ga. 574.

In North Carolina, the Act of 1799 limited the capacity of bastards to inherit from their mother to cases in which there was no legitimate issue, *Sawyer v. Sawyer*, 6 Ired. L. 407; but bastards of the same mother were allowed to inherit from each other and legitimates might take with them as co-heirs, but the bastard could not inherit from the legitimate children, *Den d. Ehringhaws v. Cartwright*, 8 Id. 39; under Bat. Rev. Ch. 36, Rule 11, the rule was the same, but a representation of the brothers and sisters was permitted, *McBryde v. Patterson*, 78 N. C. 412; *Powers v. Kite*, 83 Id. 156. The law still remains the same, Code (1883), § 1281, Rules 9, 10.

In Tennessee, under the Act of 1819, Ch. 13, § 1, bastards were given the right of inheritance from their mother where there were no legitimate children, but the right extended no further, and they could not otherwise inherit either lineally or collaterally, *Browne v. Kerby*, 9 Humph. 461. This right was afterwards somewhat extended. By the Act of 1851, Ch. 39,

the right of inheritance was given to illegitimate brothers and sisters where an illegitimate died without issue; and this right was extended to the legitimate issue of the same mother, *Riley v. Byrd*, 3 Head, 20; *Webb v. Webb*, 3 Id. 68; but under this Act it was held that illegitimates did not inherit equally with legitimates of the same mother and that while legitimate children could inherit from the illegitimate, the latter could not inherit from the former, *Woodward v. Duncan*, 1 Cold. 563; to remedy this, the Act of 1866-67 was passed, see Code (M. & V. 1884), § 3274; *Scoggins v. Barnes*, 8 Baxt. 560.

In Pennsylvania, the Act of April 27, 1855, § 3, P. L. 368, provides that illegitimates and their mother "shall respectively have capacity to take or inherit from each other personal estate as next of kin and real estate as heirs in fee simple; and, as respects said real or personal estate so taken and inherited, to transmit the same according to the laws of this State." Under this Act, illegitimate children share equally with legitimate in the estate of their common mother, *Opdyke's Appeal*, 49 Pa. St. 373, but the Act has not the effect of legitimatizing the bastard, *Grubb's Appeal*, 58 Id. 55. This Act is not retrospective, *Steckel's Appeal*, 64 Id. 493; and it does not enable a bastard who dies before his mother to transmit a right from her to his descendants, as said by SHARSWOOD, J.: "The words [of the Act] certainly do not extend to a mere possibility of future inheritance. Had the Legislature intended not merely that illegitimate children but the issue of illegitimate children should inherit, it would have been easy to have said so; but they seem carefully to confine the operation of the enactment to children taking from their mother so as to exclude the case of grandchildren and grandmothers," Id. An Act was passed in 1883, Act of June 5, 1883, P. L. 88, which provided that "illegitimate children born of the same mother shall have capacity to take from each other personal property as next of kin and real estate as heirs in fee simple in the same manner as children born in lawful wedlock." This Act has not yet been interpreted by the Supreme Court but it was held by the Orphans' Court in *Herbein's Est.*, 2 Chest. Co. Rep. 449, not to enable the issue of a deceased illegitimate to take, as representing him, from his brothers and sisters.

In New York, in default of legitimate children bastards are declared heirs of their mother as if legitimate, R. S. p. 2214, Act 1855, Ch. 547.

In Alabama a bastard inherits from his mother, Code (1876), § 1894; *Lingen v. Lingen*, 45 Ala. 410; and so in Colorado, R. S. (1883), § 1048; New Hampshire, Gen. St. (1878), Ch. 203, §§ 4, 5.

In Louisiana natural children, if acknowledged, succeed to their mother when she leaves no legitimate issue; if she leave such issue, the illegiti-

mate can claim alimony only, Code, § 918; they cannot take by right of representation from the legitimate, lineal or collateral relations of the mother, Id. § 921; but bastards of the same mother may take from each other on proof of their relationship, Code, § 923; *Dupre v. Caruthers*, 6 La. Ann. 156.

Inheritance by Bastard from Father.

In some States, there are statutory provisions whereby in certain cases a bastard may take by inheritance from his father; thus in Louisiana an acknowledged bastard may take from his father who leaves no descendants, ascendants or collateral relatives, Code, § 918; but an unacknowledged bastard cannot so take, although his paternity may have been judicially ascertained, *Dupre v. Caruthers*, 6 La. An. 156; if the father be a married man and his wife survive him, the bastard cannot inherit, Code, § 924; the bastard has no right of representation which will sustain inheritance by him from the legitimates *ex parte paterna*, § 921.

In California, a bastard is made the heir of the person who shall declare, in writing in the presence of a witness, that he is his father, Civil Code, § 6387; but the declaration must be by a writing executed for the express purpose of changing the status of the child; thus where in a will the testator simply spoke of the illegitimate as "my daughter," it was held insufficient to make her an heir, *Pina v. Peck*, 31 Cal. 359; and so a contract for nursing a child, calling her "the female child of Samuel Sandford," and signed by the father and two other persons, was held not a sufficient declaration to confer heirship, *Estate of Sandford*, 4 Cal. 12.

In Iowa, by the R. S. (1884), § 2466, and Kansas, by the Comp. Stat. (Dassler, 1885), § 2261, a bastard, acknowledged by his father or whose paternity has been proved in the lifetime of the father, may take as his heir. The recognition must be in writing or notorious; the writing, however, is not required, as in California, to be formal; accordingly a sufficient acknowledgment has been found in a series of letters written by a father to and about his natural son at school, *Crane v. Crane*, 31 Iowa, 296. The acknowledgment provided for in the statute does not legitimate the child, *Brown v. Belmarde*, 3 Kan. 41. If the acknowledgment be mutual the father may take from the son, and in Iowa he will have the same rights as the mother of an illegitimate child, R. S. § 2467; but in Kansas the mother and her issue will be preferred, Comp. St. § 2262.

In Indiana, if a man die without legitimate heirs resident in the United States, or children capable of inheriting without the United States, his illegitimate children who have been acknowledged by him in his lifetime

may take, R. S. (1881), § 2475; in establishing the fact of acknowledgement the testimony of the mother is excluded, *Id.* Under this statute, the word "heirs" is not to be taken in the sense of lineal heirs, and brothers and sisters resident in the United States will exclude in inheritance an illegitimate child, *Borroughs v. Adams*, 78 Ind. 160.

Effect of After-marriage of Parents of Bastard.

There are some States in which there is a provision for the inheritance of a bastard whose parents afterwards marry and have other children before the death of the bastard, Maine, R. S. (1883), Ch. 75, § 3; Wisconsin, R. S. (1878), § 2274; Nebraska, R. S. Ch. 23, § 31; Minnesota, Gen. Laws (1878), Ch. 47, § 5; Nevada, R. S. (1873), § 795, in which case the illegitimate child, if adopted by the father or acknowledged by him, inherits as if legitimate. There is the same provision, except that birth of other children is not required, in Colorado, R. S. (1883), § 1045. In Maine there is also a statute, R. S. (1883), Ch. 75, § 3, that an illegitimate child born after March 24, 1864, is the heir of parents who afterwards intermarry. The above statutes do not expressly declare the bastard legitimated by marriage and adoption, as do certain other statutes noted *infra*, but seem to confer all the privileges of a legitimate heir, including representation.

Inheritance by Mother of Bastard.

The mother and her relatives could not, at common law, take from a bastard, who, we have seen, could transmit heritable blood lineally only, *Flintham v. Holder*, 1 Dev. Eq. 345. By the South Carolina statute of 1791 this was left unaltered, *Barwick v. Miller*, *Jones v. Burden*, 4 Dessaus. 434; but the right of the mother to inherit is now generally acknowledged, and she will take in all the States in default of issue. In Illinois, R. S. Ch. 39, § 2; Oregon, Gen. Laws, Miscell., Ch. 10, §§ 5, 32; Nevada, R. S. (1873), § 796; Georgia, Code (1882), § 1800, she is postponed to the widow or husband of the illegitimate; in Maine, the husband or widow takes with the mother, R. S. (1883), Ch. 75, § 4; in Louisiana, the mother takes to the exclusion of brothers and sisters, Code, § 922, *Nolasco v. Lurty*, 13 La. Ann. 100; in Illinois, *supra*; Georgia, Code (1882), § 1800; Colorado, R. S. (1883), § 1048, she shares with the uterine brothers and sisters, taking half the inheritance; in the other States the mother of a bastard and her kindred inherits from him as the mother and kindred of a legitimate would from him, so far as the mother's side is concerned, Alabama, Code (1876), § 2259; California, Civil Code, § 6388;

Missouri, R. S. (1879), § 2169; Delaware, 2 Laws, Ch. 243 (Rev. Code, 1874); Wisconsin, R. S. (1878), § 2273; North Carolina, Code (1883), § 1281; Massachusetts, Pub. St. (1882), Ch. 125, § 4; Michigan, Ann'd Stat. (Howell's, 1882), § 5774 *a*; Minnesota, Gen. Laws (1878), Ch. 46, § 6; Nebraska, Comp. Stat. (1885), Ch. 23, § 32; New Jersey, R. S. (1877), p. 1299, pl. 1; Act Mar. 9, 1873, § 1; Pennsylvania, Pur. Dig., *Intestates*, pl. 40, p. 934; New York, R. S. (1882), Pt. 2, Ch. 2, § 14, p. 2212; New Hampshire, R. S. (1878), Ch. 203, § 4; Vermont, R. S. (1880), § 2232; Rhode Island, Pub. St. (1882), Ch. 187, § 7; Indiana, R. S. (1881), § 2477; Iowa, R. S. (1884), § 2465; Virginia, Code (1873), Ch. 119, § 5; West Virginia, Act 1882, Ch. 94, § 5; Kansas, Comp. St. (1879), Ch. 33, § 22; Kentucky, Gen. St. (Bul. & Fel., 1881), Ch. 31, § 5; Tennessee, Stat. 1885, Ch. 34; Arkansas, R. S. (1884), § 2524; Texas, Rev. St. (1879), § 1657; Florida, McClell. Dig. (1881), Ch. 92, § 8.

By Father.

Inheritance by the father of a bastard, in most of the few States wherein it is permitted, has been already treated; in Louisiana, the father who has acknowledged a bastard may inherit, Code, § 922. Inheritance by collaterals has already been treated.

Legitimation.

Bastards are capable of being rendered legitimate by legislation. This has been often done by legislation in special cases or by Acts providing a general way of legitimization. Such statutes are to be confined to their proper purpose, namely, the legitimization of the bastard so far as to render him capable of inheritance; they will not be carried further, *Physick's Estate*, 2 Brewst. 179; and, in Vermont, an Act which provided that the adoption of an illegitimate should render him legitimate as respected his father, Gen. St. c. 56, § 6; Comp. St. § 6, c. 55, was given a very narrow interpretation—it was held not to give a right of lineal representation; in other words the Act made the bastard the son of his father but not the grandson of his father's father, *Safford v. Houghton's Est.*, 48 Vt. 236, and see *McCormick v. Cantrell*, 7 Yerg. 615, which arose upon a special Act of the most emphatic character as to its language, which was that "A. shall in all respects be upon an equal footing with the other children of R. S." The court said: "It [the Act] did not make R. S. heir of his natural child so as to enable his legitimate children to inherit from the illegitimate of the half blood or he from them;" but it seems that an Act can be so drawn as to give the person legitimated the full right to

transmit an inheritance to her children, she dying in her ancestor's life-time, *Miller's Appeal*, 52 Pa. St. 113.

Such Acts may be retrospective and retroactive. Thus in Virginia an Act was passed in 1785 to take effect January 1, 1787, rendering legitimate children, born out of wedlock, whose parents afterwards intermarried. An illegitimate child had been born in 1775, his parents intermarried and acknowledged the child in 1776; the child was held legitimate, *Sleigh v. Strider*, 5 Call. 439; in *Stevenson v. Sullivant*, 5 Wheat. 207, the Supreme Court of the United States, relying upon a dictum of ROANE, J., in *Rice v. Eford*, 3 H. & M. 228, held the Act not retroactive; but in *Garland v. Harrison*, 8 Leigh, 368, the Court of Appeals of Virginia overruled this position and held the law to be as stated in *Sleigh v. Strider*. The Act may be so far retrospective as to legitimate the issue of a deceased person, *Gregley v. Jackson*, 38 Ark. 487; but while an Act may be retrospective it cannot take effect to divest vested rights; thus where a descent has been cast upon legitimate children, and their bastard brother is afterwards legitimated, the inheritance will not be opened so as to give him a share in the estate already taken, but he may share with his brothers and sisters in future inheritances; and where the descent has been cast upon the legal heir it will not be divested by the legitimation of a son of the intestate, *Killam v. Killam*, 39 Pa. St. 120; *McGunnigle v. McKee*, 77 Id. 81; and so where the right of the State to a collateral inheritance tax has vested, subsequent legitimation of the devisee will not destroy the State's right; thus where, on the 4th of April, 1843, the Legislature passed a bill declaring legitimate W. J. Ayres, son of W. Ayres—and on the same day W. Ayres died and on the 5th the Governor signed the bill; it was held that W. J. Ayres, who was the only child and to whom the entire estate was devised,—so that if legitimate he would have taken as heir as well as have been exempt from payment of the collateral inheritance tax—the right of the State having become vested on the day before he became legitimate, took subject to the tax, *Galbraith v. Commonwealth*, 14 Pa. St. 258.

In the following States it is provided that the subsequent marriage of the parents of a bastard and his recognition by them shall render him legitimate, Alabama, Code (1876), § 2742; Arkansas, Dig. (1884), § 2525; California, Civil Code, § 6387; Illinois, Rev. St. (1883), Ch. 39, § 3; Georgia, Code (1882), § 1786; Indiana, R. S. (1881), § 2476; Kentucky, Gen. Laws (1881, Bul. & Fel.), Ch. 31, § 6, p. 370; Maryland, Rev. Code (1878), Art. 47, § 29, p. 407; Massachusetts, Pub. St. (1882), Ch. 125, § 5, p. 743; Michigan, Annot. Stat. (Howell, 1882), § 5775 a, p. 1505 (marriage only is mentioned); Mississippi, Rev. Code (1880), § 1275, p. 366; Missouri,

Rev. St. (1879), § 2170; New Hampshire, Gen. L. (1878), Ch. 181, § 15, p. 429; Ohio, R. S. (1884), § 4175, p. 864; Oregon, Gen. Laws (1872), Ch. 10, Tit. 3, § 5, p. 549; Texas, Rev. St. (1879), Art. 1656; Vermont, Rev. Laws (1880), § 2233; Virginia, Code (1873), Ch. 119, § 6; West Virginia, Rev. St. (1879), Ch. 66, § 6; Pennsylvania, Act May 14, 1857, § 1, P. L. 507.

Recognition, as well as marriage, is necessary for legitimation, but it is gravely decided that where a man marries a pregnant woman with a child who is afterwards born, the marriage and subsequent cohabitation constitute a sufficient recognition of the child, *Bailey v. Boyd*, 59 Ind. 292; one would naturally have thought that in a case of this sort a recurrence to the maxim *Pater est quem nuptiae demonstrant* would have solved the difficulty.

It is not necessary that the whole process of legitimation be complete in the lifetime of the person to be rendered legitimate, he may be, so to speak, legitimated after death, provided no vested rights be destroyed or impaired thereby—this is well illustrated by *Ash v. Way's Administrator*, 2 Gratt. 203. R. Way was the father of an illegitimate child, Mary Ann, by one Nancy Edwards; the father in his lifetime and at his death recognized the child as his own; Mary Ann married one F. J. Ash and died leaving a son James Ash; after her death R. Way married Nancy Edwards. On the death of Way, James Ash claimed as the legitimate descendant of the decedent. To this the defendants demurred—the demurrer was overruled.

Legitimisation may be effected by application by the father to the proper court in Georgia, Code (1882), § 1787; North Carolina, Code (1883), Ch. 5, § 39, p. 15; Tennessee, Code (1884), §§ 4381-7, and by acknowledgement in writing in Alabama, § 2743, and Michigan, Annot. Stat. (1882), § 5775 a, p. 1505.

The issue of a marriage deemed null in law is in some States legitimate, Virginia, Code, Ch. 119, § 7; West Virginia, R. S. Ch. 66, § 7; Arkansas, Dig. § 2526; Texas, R. S. Art. 1656; Nevada, R. S. § 795; Nebraska, Com. St. Ch. 23, § 31; Ohio, R. S. § 4175; Wisconsin, R. S. § 2274; thus the issue of the marriage of a woman who married a second time while the first marriage was in force has been held legitimate, *Stones v. Keeling*, 5 Call, 143; and the doctrine has been carried so far as to allow the guilty father to inherit from his child, *Dyer v. Brannock*, 66 Mo. 391.

In Ohio, in a case where the question was as to the legitimacy of the issue of a marriage contracted by a man while his first wife was still living, the court was urged to restrain the force of the words "deemed

null in law" in the statute to voidable marriages only—but it refused so to do, *Wright v. Lore*, 19 Oh. St. 619.

The provision in California upon this subject is somewhat peculiar; it is that the issue of a marriage, annulled on the ground that a former husband or wife was living or of insanity, begotten before judgment is legitimate, Civil Code, § 5084. In Louisiana, the legitimation of the offspring of null marriages appears to be confined to cases wherein the parents, or one of them, act in good faith, as where a woman marries ignorantly an already married man, Code, Arts. 119, 120; *Abston v. Abston*, 15 La. Ann. 137.

Conflict of Laws as to Statutes of Legitimation.

Statutes of legitimation cannot have force as to land outside of the State in which they have been passed, so as to enable a person legitimated in one State to take land by inheritance in another, where the law would not hold him legitimate, if he were a citizen or resident of that State, see *Smith v. Derr's Administrators*, 34 Pa. St. 126—in that case one Nancy Porterfield, an illegitimate niece of the intestate, born in Tennessee, where she had been legitimated by judicial proceedings on the petition of her father, claimed to take, as heir, land in Pennsylvania, but the court relying on the case of *Doe v. Vardill*, 5 B. & C. 438, 6 Bing. N. C. 385, held that she was, *quoad Pennsylvania*, illegitimate, LOWRIE, C. J., saying: "By our law none can inherit but such as are born in lawful wedlock, except that a bastard can be heir to his mother, and perhaps some other recent exceptions. The fact that inheritable capacity is granted by law elsewhere cannot change our law of descents. A capacity in Tennessee does not prove capacity here. So far as our law is concerned, legitimation by the subsequent marriage of parents abroad, by act of a foreign legislature, or by judicial decree abroad are all fruitless. If they are allowed to constitute inheritable capacity here, then adoption might have the same effect. Then we should be without any law of inheritances in favor of relations in other States except such as our neighbors should be pleased to give us."

This decision was followed in *Barnum v. Barnum*, 42 Md. 250, in *Lingin v. Lingin*, 45 Ala. 410; in *Stoltz v. Doebring*, 112 Ill. 603, and certainly seems in accord with the general principle governing the conflict of laws, that the policy of a country in which land is situated must prevail in matters appertaining to that land, and it would seem that there are few things about which a country would be more anxious that its own policy should prevail than with reference to the devolution of land, and that the same reason which would allow a person, not capable by the *lex rei sitæ* to inherit, to

take because he is capable by the law of his domicile, would permit the substitution of the foreign law of succession in other respects, which is a thing never claimed, so far as we are aware, in respect to real estate, nevertheless there are authorities which uphold the view contrary to that of the cases cited above. In *Scott v. Key*, 11 La. 232, the question was as to the heritable capacity in Louisiana of a bastard who had been legitimated by Act of Legislature in Arkansas, where he had resided; the court held him legitimate in Louisiana, the opinion of the court being delivered by BUCHANAN, J., who said; "William was by law the legitimate son of Samuel in Arkansas, can it be that he lost his *status* by crossing the State line? . . . We think not; the heritable quality of legitimacy which he had received from the Legislature of the State of his residence accompanied him when he changed his domicile . . . If it be true that a general law of the place of domicile changing the *status* of its citizens according to circumstances is a personal statute accompanying the party into every other country, provided the circumstances which operated such change have occurred before the change of domicile, which we consider to be the doctrine settled in Louisiana, *a fortiori*, is a special law removing a disability from a particular citizen by name such a statute. The constitutional power of the Legislature to enact such enabling statutes was drawn directly in question and ruled affirmatively in *Pritchard v. Citizens' Bank*, 8 La. R. 133. The maxim cited in Story Conf L. § 51, from Boullenois, '*Habilis vel inhabilis in loco domicilii est habilis vel inhabilis in omni loco*,' must, therefore, be deemed the law of Louisiana. And it is not correct to say that the statute of Arkansas to legitimate William Eshle, which is a personal statute, conflicted with the statute of descents in Louisiana, which is a real statute, and consequently as was held in Saul's case is overruled by the latter statute. By the Louisiana statute of distribution the legitimate son inherits in preference to the brothers and sisters of the deceased. By the effect of the statute of Arkansas William Eshle was the legitimate son of Samuel Eshle. Upon the demise of Samuel Eshle in Louisiana, in 1849, fourteen years after that statute, William Eshle, as his legitimate son, was his heir by the law of Louisiana." MERRICK, C. J., dissented, arguing that a personal statute should be given effect only where there was something in common with it in the general law of the country within whose territory and in whose courts it was sought to force it, and said: "The child of the fourth wife of the Mohammedan, and the child, perhaps, of the thirtieth wife of the Mormon have the status of legitimacy in their own countries, would our courts give effect to that status should such heirs present themselves here?" The decision is supported by the case of *Miller v. Miller*, 91 N. Y. 315; it

was there held that legitimation in Pennsylvania would confer a status which would be recognized in New York.*

The great vice of the opinion of the majority of the court in *Scott v. Key* is that it assumes the whole question, and simply asserts that William was legitimate in Louisiana and that a legitimate son was preferred in Louisiana. Now the latter part of the assertion is undoubtedly true, but it is to be remembered that legitimacy is defined in the Code of Louisiana, and there is nothing to prevent different standards of legitimacy being set up in different countries, and in fact different standards have been set up. If, then, a criterion of legitimacy, different from that of the State in which heritable land lies, which has been set up by the State having personal jurisdiction of the claimant of that land (and the matter is not helped by the fact that at the time of descent cast he had passed from under that jurisdiction), is to be enforced by the court of the State in which the land lies, we have, in that State, not one rule of succession to real property but as many rules as there happen to be claimants resident outside the State, or, if the claimant who has formerly resided outside the State now resides in it, and by the law of the State would be *prima facie* illegitimate, we should have to hunt up his antecedents and ascertain whether at any time in his peregrinations over the face of the earth he has resided in any place where he was regarded as having acquired the status of being legitimate. The personal status which accompanies the person wherever he goes is the *strictly* personal status, such as the status of sanity, and the rule should never be stretched so as to allow an interference with the real statutes of another State. The true position may, we think, be briefly put thus—the *lex rei sitæ* requires legitimacy for the purposes of inheritance, that law defines what it means by legitimacy, and how legitimacy may be acquired; if a person do not fall within that definition, he is not legitimate within the purview of that law; hence he cannot inherit, no matter how he would be considered by the law of another State for the purposes of inheritance of land within its borders. The Louisiana doctrine therefore appears to us utterly unsupported by reason and general principle and we find no authority in direct support of it, except *Miller v. Miller*, 91 N. Y. 318. There is a case in Mississippi

* In this case Miller, J., who delivered the opinion of the Court of Appeals, criticized the case of *Birtwhistle v. Vardill*, 7 C. & F. 915, the great English authority for the doctrine contrary to that held by the Court of Appeals, and quoted with approbation from Lord Brougham's dissent. It sounds a little strange to hear his lordship, whose reputation must ever rest rather on his powers and achievements as an advocate and a politician than on his judicial character and record, spoken of as "one of the ablest of English jurists." Great man as he was, his warmest admirers can hardly claim that position for him.

which, at first blush, seems to recognize the same principle, but on examination will be seen to rest on a different ground. In that case, *Smith v. Kelly's Heirs*, 23 Miss. 167, it was held that a resident of South Carolina born out of wedlock, whose parents had afterwards married and had acknowledged him, could not inherit in Mississippi because under the law of South Carolina such marriage and acknowledgment did not work legitimation, though they could have done so in Mississippi. The reason and propriety of this decision are plain—a legitimating statute can act only on citizens of the legitimating power, and the South Carolinian was never subject to the Mississippi legislation, hence he never became legitimate anywhere.

The learned opinion of GRAY, C. J., in *Ross v. Ross*, 129 Mass. 243, puts the case in a somewhat different shape. He maintains the doctrine that the status of legitimacy acquired at the domicile will give inheritable power to the person so legitimated, provided the status is one which may exist under the law of the State where it is called in question; and, while the case did not directly involve the rights of a person legitimated outside of the State in which the land claimed existed, the learned Judge, nevertheless, discussed the question of the effect of foreign legitimation, and spent some time in showing that the English rule, which he admitted to be that though a person legitimate by the law of his domicile was legitimate in England for other purposes, yet he could not, unless legitimate by the English law, inherit land in England, was based on the refusal of Parliament in the Statute of Merton, 20 Hen. III. c. 9, to adopt the continental rule of legitimation by subsequent marriage; but this hardly seems to cover the matter or to sustain the position taken, if it be sought to deduce from it a rule that a foreign legitimation by a general or special statute will render the subject thereof legitimate in any State of the Union in which does not exist a similar statute and within whose boundaries the inheritance is to be cast, for there is no question that the common law did not recognize legitimation in the case stated—the Statute of Merton merely recognized the common law in that respect, its spirit was the famous *nolumus mutare*; the common law was undoubtedly introduced into this country, or into all the States derived from the English settlements; in them, therefore, until a change was made by statute, there existed a law inconsistent with the allowance of *inheritance as legitimate* of any one legitimated by extra territorial statutes which, after the fashion of the civil law, allowed the subsequent marriage of the parents to have the effect of legitimation; hence, even adopting Chief Justice GRAY's position, no difference in result is worked in those of the United States which derive their law from the common law—and we still think, in spite of *Ross v. Ross*, that

unless a statute of a similar character be extant in the State in which the land lies, a statute of legitimization of the character referred to passed in another State, could not enable the subject thereof, by giving him *status*, to inherit; and it is difficult, in view of the common law definition of legitimacy, which requires birth in wedlock, to see how a foreign statute of any kind could have that effect.

In Indiana, the law legitimating a bastard is held not to be an act creating a status, but one conferring heritable qualities on certain persons, and, therefore, one who in the State of his domicile could not have inherited was held capable of inheriting under the provisions of the Indiana statute, *Harvey v. Ball*, 32 Ind. 97; in this case FRAZER, C. J., went out of his way to recognize the doctrine that the status acquired at the domicile should govern the descent of lands not within the State of the domicile, but one judge only concurred in the opinion, and the case was not decided as on a question of status, hence it is not an authority upon that point.

Inheritance by Adopted Child.

The next question to be considered is the right of inheritance of an adopted child. Adoption is to a certain extent derived by us from the civil law; it was unknown to the common law. By the old Roman law, under which, as is well known, the family was the unit of society, an adopted son lost all right of succession to his natural father while he continued in the adoptive family, though he might recover the right on leaving the adoptive family before the death of his natural father, he was, however, *suus heres* of the adoptive father. If he left the adoptive family after the death of the natural father, he had no inheritance at all. Just. (Sandars), Lib. III. Tit. 1, 10, p. 369. He might, however, even while without his natural family, be called to the succession of his natural father as one of the *cognati*, but only in default of *sui heredes*, emancipated children and *agnati*, Just. (Sandars), Lib. I. Tit. 11, p. 121. The law in this respect was altered by Justinian and, by his enactment, the adopted person not only acquired the right of succession to the adoptive father if he should die intestate, but he retained his right of succession to his natural father, but he could not, as he could under the ancient law, claim the right to be either constituted an heir or be expressly disinherited, Just. Lib. III. Tit. 1, p. 14.

In this country, statutes of adoption have, since 1850, been very generally adopted. By many of these statutes the person adopted becomes the heir of the person adopting, as if a child of that person, Connecticut, Act 1885, Ch. 110, § 66; Ohio, R. S. § 3140; Indiana, R. S. § 825; Iowa,

§ 2310; Michigan, Annot. St. § 6379; Kansas, R. S. Ch. 67, § 7; Delaware, Act April 10, 1885, Laws of Del. vol. 17, Ch. 612; Kentucky, Gen. L. Ch. 31, § 17; Tennessee, 2 R. S. (1873), pp. 1507, 1508; Code (1884), § 4390; Pennsylvania, Act 1855, § 1, Pur. Dig. 78; Missouri, R. S. § 601; Arkansas, Act 1885, Ch. 28, § 4; Colorado, Act 1885, p. 18, § 4; Florida, Act 1885, § 3594; Louisiana, Rev. Civ. Code (1875), § 214; and so, except that he cannot inherit property limited to the heirs of the body, in New Hampshire, R. S. Ch. 188, § 4; Vermont, R. S. §§ 2536, 2541; New Jersey, R. S. (Infants' Act), pl. 9, p. 1347; Act 1882, Ch. 185; Wisconsin, R. S. § 4024; Rhode Island, Pub. St. Ch. 164, § 7; Maine, R. S. Ch. 67, § 35; Illinois, R. S. Ch. 4, § 5; Oregon, Gen. L. Misc. Laws, Ch. 13, § 67; and we think that in the absence of a statute it would be held that there could be no factitious heir of the body.

In Nebraska, the Act regulating adoption provides that an adopted child shall take such "rights, privileges and immunities as the adopting parent states in his petition of adoption he desires to bestow," Gen. St. (1873), p. 649.

In Massachusetts, the heir by adoption inherits from the adopting parents and their descendants such property as they might have devised, but he cannot take by descent from collateral kindred of the adopting parents, Pub. St. Ch. 148, § 7. In certain States he takes as heir but without the right of representation, either lineal or collateral, Alabama, Code, § 2745; Maine, in case of adoption since Feb. 24, 1880, *supra*; Rhode Island, *supra*; Illinois, *supra*; North Carolina, Code, § 3; Oregon, *supra*; Georgia, Code, § 1788.

In Texas, if the adoptor have children, at the time of adoption or afterwards, the adopted child can inherit no more than one-fourth of the estate of the adoptive parent; and in Louisiana the adoption of a child by a person having legitimate children is not allowed to interfere with the rights of the former heirs.

In New York, Act 1873, Ch. 830, § 10, and Minnesota, R. S. Ch. 124, § 31, the act of adoption has no effect upon the heritable rights of the person adopted or any one else—this was formerly the law in Maine, R. S. (1871), p. 538, and is so still with reference to adoptions made prior to February 24, 1880.

In Pennsylvania and New Jersey, it is provided that the adopted and natural children shall inherit from and through each other as if all were natural children of the same parent. But, it is to be noted, that in Pennsylvania it is held that the effect of the adoption is only to make the adopted person an heir, not to give him the privileges of a son, and his

inheritance is therefore subject to the collateral inheritance tax, *Commonwealth v. Nancrede*, 32 Pa. St. 389.

While the adopted person thus secures a right of inheritance from his adoptive parent he does not, except in Connecticut, lose his right to inherit from his natural relatives; in Connecticut, however, he does lose such right.

Inheritance from Adopted Person.

Where the statute simply provides for the adoption of a person, or that he shall be heir of the person adopting, the rule is that the heirs of the adopted person will be those of his natural blood and not the members of the adopting family; this was settled, upon the construction of the Missouri statute in *Reinders v. Koppelmann*, 68 Mo. 482, and, on the construction of the Indiana statute, in *Krug v. Davis*, 87 Ind. 590; in the latter case it was held that the mother of an illegitimate child was its heir, notwithstanding its adoption by another woman, and in both the cases the blood relatives of the adopted person were allowed to take property which had been derived from the adoptive parents; this, which certainly seems contrary to natural justice, is guarded against in Massachusetts; New Jersey; Ohio; Indiana, Act 1883, Ch. 55; Illinois; Wisconsin, R. S. § 2272; Texas, R. S. § 1647; Minnesota; and Colorado, by the provision that if the adopted person die intestate, without issue, (in Indiana, Illinois, Wisconsin and Texas without issue or wife), the property acquired by gift, devise or descent from his adopting parents or their kin, shall revert to them or their heirs. The Indiana statute was probably produced by the decision in *Krug v. Davis, supra*.

In three States, it is provided that property acquired by the adopted person shall be inherited by his adoptive parents or their kin, Massachusetts, Pub. St. Ch. 148, § 7; Connecticut, Stat. 1885, Ch. 110, § 66; Minnesota, Stat. 1885, Ch. 75; but in Massachusetts this is expressly not the case with regard to property received by the adopted person from his natural kin. In Tennessee, Code, § 4390, and Georgia, Code, § 1788, the adoptive father can never inherit from his adopted child.

Extra-territorial Adoption.

As to the effect of an extra-territorial adoption, it is held in *Ross v. Ross*, 129 Mass. 243, that an adoption duly made in the country of the domicile will create a capacity to inherit lands in a country whose laws allow adoption in like manner and with like effect. By the Act of 1876, Ch. 213, § 11, which was passed after the descent considered in *Ross v. Ross* was

cast, it is provided that any inhabitant of another State adopted in accordance with the laws thereof shall, upon proof of the said fact, be entitled in Massachusetts to the same rights as to succession to property as he would have enjoyed in the State in which the act of adoption was executed, except so far as they may conflict with the act, Pub. St. Ch. 148, § 9. But the child adopted abroad can have no other or greater rights than those given by the *lex rei sitæ*. Thus, in *Keegan v. Geraghty*, 101 Ill. 26, the petitioner, who had been adopted by one Keegan, under the laws of Wisconsin, claimed the right to inherit from a deceased child of the said Keegan land in Illinois, which had been bequeathed by Keegan to his deceased child. Under the Wisconsin statute the adopted child was deemed for the purpose of inheritance . . . “the same to all intents and purposes as if such child had been born in lawful wedlock of such parent or parents by adoption, saving only that such child shall not be deemed capable of taking property expressly limited to the heirs of the body of the adoptor.” The Illinois statute contained the further limitation “nor property from the lineal or collateral kindred of such parents by right of representation.” It was held that the petitioner was not entitled to inherit.

In Indiana, upon the filing of a record of a foreign adoption it will take effect within the State, and the child adopted will take the same rights as though adopted within the State, R. S. § 829.

Right of Heir Presumptive.

While, as we have seen, an heir, before his estate has vested, after the death of his ancestor, has no such right as will protect him against a legislative change of the course of descent, yet the law so far considers his expectancy as to protect it against any mere constructive destruction; accordingly, it is held that where a testator wishes to cut his heir off from his rights in any land he must do so by devising that land, either expressly or by necessary implication, to a person other than the heir, *Doe d. Clendenning v. Lanius*, 3 Ind. 441; *McIntire v. Cross*, Id. 444; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, Ch. 600; and disinheritance will not be worked, no matter how strongly the desire of the testator to disinherit his heir may appear on the face of the will, provided the property is not given to any one else, *Denson v. Autrey's Executor*, 21 Ala. 205, it is enough for the heir to be able to say “it is not given to any one else,” and he will be entitled to take the land even against the testator’s intention, *Roosevelt v. Heirs of Fulton*, 7 Cow. 71; *Haxtun v. Corse*, 2 Barb. Ch. 506; hence the heir will not be cut off by a naked power to sell given to an executor, *Doe d. Clendenning v. Lanius*, *supra*, or by a devise to himself with a declara-

tion that he shall not claim anything else from the ancestor's estate, *McIntire v. Cross, supra*. And the course of descent will not be altered by any words of agreement, where the land is not disposed of away from the heir; thus, in *Cannon v. Nowell*, 6 Jones L. 436, a father made a deed of gift to his son, reciting as follows: "in consideration of this gift of land the said Caltern C. Cannon is not to have or be entitled to any more of the land of his aforesaid father unless the same should be given him by deed, will or otherwise by his aforesaid father." The father died intestate; it was held that Cannon was not excluded from the inheritance but took as co-heir with his sister, the only other heir, of course subject to having the land conveyed to him by deed regarded as an advancement. In Illinois, where the wife is a statutory heir, it is held that an ante-nuptial agreement and settlement in bar of dower will not prevent her taking as heir, *Sutherland v. Sutherland*, 69 Ill. 481, but in Indiana, by statute, an ante-nuptial jointure will bar the right of husband or wife in each other's property, R. S. (1881), §§ 2500, 2501. In the case of a void or lapsed devise, the land devised goes to the heir, *Williams v. Whittle*, 50 Ga. 523; *Ridgely v. Bond*, 18 Md. 433; *Grand Tower Mining, Manufacturing and Transportation Co. v. Gill*, 111 Ill. 541; and so if a legacy, directed to be raised out of land, lapses, *Cox v. Harris*, 17 Md. 23; *Helms v. Franciscus*, 2 Bland, 546; *Greene v. Dennis*, 6 Conn. 292; *Rowlett v. Rowlett*, 5 Leigh, 26; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, Ch. 600.

Descent Worthier Title than Devise.

Connected with the favor shown by the law to the heir is the rule that where a person who is heir of his ancestor is also made a devisee, by that ancestor, of the exact estate which, had there been no will, he would have taken as heir, he shall be held to be in by descent as the worthier title, *Barnitz's Lessee v. Casey*, 7 Cr. 464; *Philips v. Dashiell's Lessee*, 1 H. & J. 478; *Medley v. Williams*, 7 G. & J. 61; *Hoover's Lessee v. Gregory*, 10 Yerg. 444; *Ellis v. Page*, 7 Cush. 161; hence, a devise to the heir for his portion is void, *Sedgwick v. Minot*, 6 Allen, 171; a charge upon the property will not convert the heir into a devisee, *Buckley v. Buckley*, 11 Barb. 43; a partition will not have that effect, *Conkling v. Brown*, 8 Abb. Pr. N. S. 345; but a change of tenure will cause the devise to take effect as such; *Gilpin v. Hollingsworth*, 3 Md. 190; and see *McKay v. Hendon*, 3 Murph. 209; and where one who would be otherwise co-heir to a tract of land receives, by the will of the ancestor, the entire tract he will hold all by devise, *Gilpin v. Hollingsworth, supra*. The preference of heirship

will not be carried so far as to cause a subsequent change of the law to convert a title, which when taken was by devise, into one by descent. Thus, in North Carolina, in 1777, when the law of primogeniture was in force, A. died, having devised land to his younger son George; in 1784 primogeniture was abolished, so that, had A. then died, George would have taken the land as an heir; it was held that, having taken as a devisee, he could not, by the operation of the statute, be converted into an heir, and, hence, on his death the land would be regarded, for purposes of descent, as purchased land, *Den d. Burgwyn v. Devereux*, I Ired. L. 583.

Post Testamentary Children.

The favor shown by the law to heirs is manifested by the provisions which exist in most, if not all, of the States, whereby when a will has been made, and children are afterwards born who are not provided for in the will, the testator will be held to have died intestate, so far at least as to give to the children the shares of the paternal estate they would have taken, had the parent actually died without a will. The rule in some States is that children born after the making of the will by the parent, and unprovided for, will take as in case of intestacy, New Hampshire, R. S. Ch. 193, § 10; Massachusetts, Pub. St. Ch. 127, § 21; Maine, R. S. Ch. 74, § 9; Nebraska, R. S. Ch. 23, § 148, p. 302; Nevada, C. L. § 825¹; Vermont, R. S. (1880), § 2241; Rhode Island, Pub. St. Ch. 182, § 12; *Potter v. Brown*, 11 R. I. 232; Michigan, Ann'd St. § 5809; Wisconsin, R. S. § 2286; *Bresee v. Stiles*, 22 Wis. 120; North Carolina, Code, § 2145; Minnesota, Gen. Laws, Ch. 47, § 22; Alabama Code, § 2284; Delaware, R. C. Ch. 84, § 12; Missouri, R. S. § 3969; Arkansas, R. S. § 6499; Colorado, R. S. § 3488; California, C. C. § 6306; Oregon, Gen. Laws, Misc. Laws, Ch. 64, § 10; Kentucky, Ch. 113, § 25; *Shelby's Ex. v. Shelby*, 6 Dana, 60; New York, R. S. Pt. 2, Ch. 6, Tit. 1, § 49; Illinois, R. S. Ch. 39, § 10; in others the rule is that to prevent inheritance by an after-born child, he must be expressly excluded by the will, Virginia, Code, Ch. 118, § 18; West Virginia, R. S. Ch. 201, § 17; Tennessee Code, § 3033; South Carolina, R. S. § 1864.

In Virginia, Code, Ch. 118, §§ 17, 18; West Virginia, R. S. Ch. 201, §§ 16, 17; Texas, and Kentucky, the will affected by the after-birth may take effect if the child or children die under twenty-one and without issue.

In some States the *quasi* revocation of a will by the after-birth of children applies only where, at the time of making the will, the testator had in existence other children, New Jersey Rev. (1877), 1246, pl. 19; Ohio, R. S. § 5961; Kansas, Comp. St. Ch. 117, § 39; Mississippi Code, §§ 1263-4; Texas R. S. §§ 4868, 4870.

The law upon this subject in New York was formerly confined to inheritance from the father, R. S., § 49, Art. 3, Tit. 1, Ch 6, and after the passage of the Act of 1849, allowing *femes covert* to make wills as though unmarried, the court refused to extend the equity of the statute so as to allow the after-born child to inherit from the mother, *Cotheal v. Cotheal*, 40 N. Y. 405; but the later Act provides; “Whenever a testator shall have a child born after the making of his will, either in his lifetime, or after his death, and shall die leaving such child unprovided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent’s real and personal estate” as he would have taken had the parent died intestate, “and shall be entitled to recover the same portion from the devisees and legatees.” Under this statute it is held that the remedy of the after-born child is not confined to a recovery from the legatees and devisees, and that he may attach the land itself in the hands of a grantee of a devisee, *Smith v. Robertson*, 89 N. Y. 555, affirming S. C., 31 N. Y. Supr. C. 210; RAPALLO, J., remarking: “The infant does not take under the will or subject to any of its provisions.”

In Pennsylvania, by the Act of April 8, 1833, § 15, if a person make his will and afterwards have a child for whom he does not provide in the will, and who survives him, he will be held to have died intestate as to that child, see *Walker v. Hall*, 34 Pa. St. 483; *Grosvenor v. Fogg*, 81 Pa. St. 400, and the provision in the will to exclude the child, it is decided, must not be illusory, for where the testator made a will appointing his wife guardian of any children who might be born, saying “which guardianship I intend and consider as a suitable and proper provision for such child or children,” it was held that there was no such provision as would prevent an intestacy as against after-born children, *Hollingsworth’s Appeal*, 51 Pa. St. 518. In the *Appeal of McCulloch et al.*, 113 Pa. St. 247, there was an attempt made to extend the working of the Act so as to render capable of inheritance, as an unprovided child, one born out of wedlock before the date of the father’s will, and legitimated by the marriage of its parents after the making of the will, but the Supreme Court held, reversing the decree of the court below, that the only after-birth contemplated by the Act was the physical birth, and that though by the marriage and the effect of the Act of 1857 the child became, what she was not before, her father’s legally recognized child, yet the Act of 1823 “was intended to provide for children actually born after the execution of the will and of whose existence their father is supposed to be ignorant at the time of making his will, and not for those previously born and then in full life.”

In Georgia to work an intestacy it seems that both marriage and birth of issue must take place subsequently to the will, Code, § 2477.

In Massachusetts, New York, New Jersey, Virginia, West Virginia, North Carolina, Kentucky, Tennessee, Arkansas, Texas, Mississippi, a provision made for the child by the testator in his lifetime will, it seems, have the effect of preventing an intestacy; in Missouri, California and Oregon, this provision must amount to a full share by way of advancement; in the other States the law probably is that this provision must be made in the will.

If by the will the after-born issue are expressly excluded in New Hampshire, New Jersey, Virginia, West Virginia, Kentucky, Missouri, Arkansas, Texas, California and Oregon, intestacy will not take place. In these States, it seems, that the intent cannot be shown otherwise than by express exclusion, and in Missouri, it is enacted that, where the child is not provided for, no testimony will be received to rebut the presumption of unintentional omission.

In California, the proviso is thus expressed: "unless so mentioned in the will as to show an intention to exclude," and no other testimony is receivable.

In other States, it is sufficient that it appear that the omission was intentional, see Massachusetts, New York, Maine, Vermont, Illinois, Michigan, Wisconsin, Minnesota, Nebraska, Tennessee, Nevada, Colorado and Mississippi.

In *The Chicago, Burlington and Quincy Railroad Co. v. Wasserman*, 22 Fed. Rep. 872, it was held that a devise by a husband to his wife, who was *enceinte*, showed no intention that this child *in ventre* should not be provided for.

Posthumous children are within the protection of the law bearing upon post-testamentary children, *Willard's Estate*, 68 Pa. St. 327; *Edward's Appeal*, 47 Id. 144; *Riddle's Estate*, 14 Phila. 327; *Holloman v. Copeland*, 10 Ga. 79; and they are also protected in some States by special statutory provisions, thus it is enacted that they shall take as in case of intestacy in Maine, R. S. Ch. 74 § 8; Minnesota, Gen. L. Ch. 47, § 22; Iowa, R. C. § 2334; Massachusetts, Pub. St. Ch. 127, § 22; and, unless it appear to be the intention of the testator that they shall not be provided for, in Michigan, Annot. Stat. § 5809, p. 1516; unless they are "expressly excluded or barred by the will," in New Jersey R. S. (1877), p. 299, pl. 8; Act 1846; or are disinherited, in Mississippi, Code, § 1263; New Hampshire, R. S. Ch. 193, § 10. In Maine, it is held that a posthumous child cannot be disinherited, as can a living one, and, unless he be provided for, the presumption is conclusive that he was unexpected, *Waterman v. Hawkins*, 63 Me. 156.

In Mississippi, there is a provision that if there be no children but the posthumous one, the will can have no effect unless the child die under age, unmarried and leaving no issue capable of inheriting; if he so die the will

will govern in the disposition of the estate except so far as it has been consumed in the support and education of the infant, Code, § 1263; so in Texas, R. S. Art. 4869¹; Virginia, Code, Ch. 118, § 17; West Virginia, R. S. Ch. 201, § 16.

In some States, it is provided that where a posthumous child takes against a will he shall have the benefit of the doctrine of advancement, Ohio, R. S. § 5962; Kansas, Ch. 117, § 40; California, C. C. § 6309; Nevada, R. S. § 828; North Carolina, R. C. § 1483, but it has been held, in the absence of statutory requirement to that effect, that in such case the devisees who would have to contribute need not bring their advancements into hotchpot, *Wilson v. Miller*, 1 Pat. & H. 353, and see *Wilson v. Fritts*, 32 N. J. Eq. 59.

Omitted Children.

Some States have gone even further in the protection of heirs and have provided for inheritance by living children who have been omitted from the wills of their parents. All of the statutes upon this subject proceed upon one ground, viz., the assumption that the testator would not willingly disinherit his offspring—although the particular provisions of the various statutes differ somewhat. In Massachusetts, the provision upon the subject is that when any testator “omits to provide for any of his children or for the issue of a deceased child,” the persons omitted shall take such share of the testator’s estate as they would have taken had he died intestate “unless they have been provided for by the testator in his lifetime or unless it appears the omission was intentional and not occasioned by accident or mistake,” Pub. St. (1882), Ch. 127, § 21, p. 750. The statutes of Maine, R. S. Ch. 74, § 9, and California, C. C. § 6307, are to the same effect; and see New Hampshire, R. S. Ch. 193, § 10, where the provision is for a child ‘not named or provided for.

Under statutes of this class, in order to disinherit a child, intent must be shown, but a designed omission will have that effect, *Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 Id. 570; *Church v. Crocker*, 3 Id. 17; *Wilder v. Goss*, 14 Id. 357; and an exclusion will disinherit the heir, although made under a mistake of law as to matter *dehors* the will, and though it would not have been so made but for such mistake, *Hurley v. O’Sullivan*, 137 Mass. 86. A devise to the children of a child named is held to show an intentional omission of the child, *Wild v. Brewer*, *supra*; so the mention of two of a number of brothers and sisters, grandchildren of the testator, is held to show an intentional omission of the brothers and sisters not named, *Merrill v. Sanborn*, 2 N. H. 499; and the naming

of a son-in-law is an effective exclusion of his wife, the testator's daughter, *Wilder v. Goss, supra.* Where a person has been provided for in a will, and is afterwards adopted by the testator, who lives for several years, and makes no change in the will, the provision will be sufficient to show an intention to give the adopted child no more than had been given to her by the name she bore before adoption, and hence she cannot claim against the will as an omitted child, *Bowdlear v. Bowdlear*, 112 Mass. 184.

In Missouri, the protection of the child has been carried even further. The Acts of 1815 and 1821 provided: "Where any person shall make his last will and testament, and omit to mention the name of any child or children if living, or the legal representatives of such child, . . . every such person, so far as shall regard . . . such child shall be deemed to die intestate." The Act of 1825 altered the phraseology of the law and provided, where a person "should die, leaving a child or children or the descendants of any child or children," then in case of their death unprovided for, the intestacy *pro tanto* should arise. By the Act of 1834-5, the Legislature practically re-enacted the foregoing Acts as to children not named or provided for. The Act of 1845 is the same, R. S. (1879) § 3969.

Under this legislation, it is held that it was not the intention of the law merely to raise a presumption of forgetfulness of an omitted child, but to compel a person who intends to disinherit a child to manifest that intention directly, hence it was held that a devise to a wife as sole heir would not have the effect of excluding from inheritance the testator's issue, the court calling attention to the fact that the qualifying clause of the Massachusetts statute, "unless it shall appear that such omission was intentional and not occasioned by any mistake or accident," had no counterpart in the Missouri statute, *Bradley v. Bradley*, 24 Mo. 311. It does not seem necessary that to constitute a naming the person excluded should be mentioned by name, but it must appear clearly that he was in the mind of the testator, and that fact must appear by the will itself; thus in *Beck v. Metz*, 25 Mo. 70, where the bequest was as follows: "I leave it entirely to the will and judgment of my said wife Catharine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our own child or children," etc., the expression, "our own child," was held a sufficient naming to uphold the will; and in *McCourtney v. Mathes*, 47 Mo. 533, a bequest to the wife solely with a recital that she should have the management of the children, with a devise over to the testator's heirs in case of the remarriage of the widow, was held a sufficient naming of the children; but a mere devise to a wife solely, as we have seen, *supra*; or a devise to a wife "to the exclusion of every person or persons, be the same relations or not," will not exclude children. *Hargadine v. Pulte*, 27 Mo. 423; *Hock-*

ensmith v. Slusher, 26 Id. 237, is a case a little different from the general tendency of Missouri authority, the court there said that, "where the relation of one person by the natural association of ideas suggests another, it may reasonably be inferred that the latter was in the mind of the testator," and held that a bequest to one who was son-in-law to the testator, although he was not described as such in the will, was sufficient to exclude his wife, the testator's daughter. This case was cited in *Hargadine v. Pulte*, but without affecting its decision. A distinction may be observed between the two cases, in that in the one case there was a general exclusion of every body, which might possibly be consistent with the fact that the child was not in the contemplation of the father, while in the other case, presumably, the only reason for mentioning the son-in-law was his relationship to the daughter.

To sustain an exclusion in the case of grandchildren they are sufficiently named by a bequest to their deceased mother, for they take by representation, *Guitar v. Gordon*, 17 Mo. 408.

In Oregon, the statute, Gen. L. p. 788, § 10, is the same as in Missouri, and it has been held that a naming might be by reference to another instrument; thus in *Gerrish v. Gerrish*, 8 Oreg. 351, Mary Ann Gerrish died, seized of certain realty; she was also possessed of a life estate under the will of her husband which contained the following provision—"at her decease [Mary Ann's] I do devise and bequeath all that may remain of my real and personal property to each of my living children and the children of my deceased daughters." Mary Ann left a will in which the only reference to her children, direct or indirect, was "I direct that whatever may remain at my death of the personal property bequeathed to me by my late husband James Gerrish for my life shall at my death be distributed in accordance with the provisions made in the last will of my said husband concerning the same." The court held that the children were sufficiently named by the reference to James Gerrish's will and that they consequently could not claim from Mary Ann Gerrish *quasi ab intestato*.

The statute of Arkansas coincides in its provisions with those of the two foregoing States, R. S. § 6500.

In Mississippi, the provision is in favor of a child neither provided for nor disinherited, Code, § 1264.

In another class of statutes the presumption is that the omission was intentional, and it must appear that the omission of the child or issue of a deceased child was not intentional but was made by accident or mistake, Michigan, Ann'd Stat. § 5810; Minnesota, Ch. 47, § 23; Nebraska, R. S. Ch. 23, § 149; Nevada, R. L. § 826; Vermont, R. S. 2242; Wisconsin, R. S. 2287. In three States the presumption of unintentional omission is

made to rest on a belief in the death of the omitted person; in Kansas, Comp. L. § 6607, the enactment is that a child absent or reported dead and not provided for shall take as in case of intestacy, but if by the will his children are provided for the child so reported dead or absent will take the provision left to them; and so in Ohio, R. S. § 5961. In Kentucky, the enactment is that a child or grandchild believed to be dead or a child dying out of the State and leaving issue of whose existence the testator is ignorant, unprovided for and not excluded shall take as though the testator had died intestate. The presumption that the omission was unintentional may be rebutted by parol or other proof, Gen. L. (Bul. & Tel.), Ch. 113, § 19, p. 836.

An extra testamentary provision for the omitted child will be sufficient to uphold the will as against him in Massachusetts, Maine, *supra*, and Missouri, R. S. § 3970; in the two latter States it must be of an equal portion of the estate.

A posthumous child is within the protection of the statute in Massachusetts, *Bowen v. Hoxie*, 127 Mass. 577; and so is one born after the execution of the will, *Bancroft v. Ives*, 3 Gray, 367. As to illegitimate children, in Massachusetts, they are held not to be included, *Kent v. Barker*, 2 Gray, 535, but in California, the contrary view is taken, on the ground that the illegitimate child is an heir of his mother and inherits from her in the same manner as if he had been born in lawful wedlock, *Estate of Ada Wardell*, 57 Cal. 484, affirming S. C., Myr. Prob. 224.

The above statutes must be confined in their operation to lands in which the testator had a devisable and inheritable estate, and where the testator had only a power of appointment under a will or deed, and has failed to exercise it in favor of a child, the latter cannot claim under the statute as having been omitted, for he could never have taken from his father but only under the instrument creating the power, *Sewall v. Wilmer*, 132 Mass. 131.

When Inheritance takes place.

Inheritance takes place immediately on the death of the person seized, *Farmer v. Ray*, 42 Ala. 125; *Campbell v. Brown*, 6 How. (Miss.) 634; *Bullock v. Snead*, 13 S. & M. 293; *Womack v. Womack*, 2 La. Ann. 339; *Glasscock v. Clark*, 33 Id. 584; *Williams v. Whittle*, 50 Ga. 523; *Overturf v. Dugan*, 29 Oh. St. 230; *Root v. McFerrin*, 37 Miss. 46; and it makes no difference how long or how short a time the heir survive the ancestor, if he survive at all, all the consequences of a vesting in him follow; if the heir be an infant just born alive it is enough, *Haywood's Heirs v. Moore*, 2 Humph.

584; so where ancestor and heir perish by the same calamity it is enough if the heir live for even a few minutes, after the death of the ancestor, to cause him to take, *Martindale v. Kendrick*, 4 G. Greene, 307. It is to be remarked that where several persons perish in a common disaster there is no presumption as to survivorship and, therefore, in the absence of evidence that one was seen alive after the death of the other, their estates will devolve as though all had died simultaneously, *Russell v. Hallett*, 23 Kan. 276; *Newell v. Nichols*, 75 N. Y. 78; *Coye v. Leach*, 8 Metc. 371. This position is adopted, in a case in which the matter was learnedly and exhaustively considered, with the following modification—"but when the calamity, though common to all, consists of a series of successive events separated from each other in point of time and character and each likely to produce death upon the several victims according to the degree of exposure to it, in such case, the difference of age, sex and physical condition becomes a matter of *evidence*, and may be considered." . . . *Smith v. Croom*, 7 Fla. 81. The reasonableness of this doctrine is manifest. The court, at the time of announcing it, had before it the case of loss of life in a wreck.

Where a common disaster has overwhelmed several persons, the one last seen or heard alive within the operation of the cause of death will be presumed to be the survivor, unless there be something in the nature of the circumstances to rebut such a presumption, *Pell v. Ball*, 1 Cheeves Eq. 99; *Smith v. Croom*, *supra*.

Consequence of Immediate Vesting—Subjection to Debt, Dower, etc.—Possession.

The heir has, immediately on the demise of the ancestor, a vested and conveyable interest, *Hyde v. Barney*, 17 Vt. 280, and must be made a party to all actions or suits *in rem* affecting the subject of descent, as a bill to foreclose a mortgage, *Huggins v. Hilliard*, 10 Ala. 283; he takes the land subject to the dower right of the widow of the ancestor, *Farmer v. Ray*, 42 Ala. 125, but his right to possession is (except perhaps in Georgia, as to which see *Albritton v. Bird's Ex'r*, R. M. Charl. 93) immediate, *Willis v. Watson*, 5 Ill. 64; *Piatt v. St. Clair's Heirs*, 6 Oh. 227, S. C., Wr. Ch. 261; *Blair v. Cisneros*, 10 Tex. 37; *Chubb v. Johnson*, 11 Tex. 469; charging the land with the testator's debts, will not deprive him of this right, *Trent v. Trent's Ex'r*, Gilm. 174; the land is taken, it is true, subject to the testator's debts, but until the liability is enforced in the manner and under the circumstances prescribed by law, his right of possession cannot be interfered with, and he will be entitled to all rents and profits accruing between the casting of the descent and the assertion of the lien of debts, *Cockrell v.*

Coleman's Adm'r, 55 Ala. 583; *Patton v. Crow*, 26 Id. 432; the Supreme Court of Illinois thus states the position of descended lands with reference to the ancestor's debts: "It is not accurate to say that the lands are charged but rather that they are liable to be charged, as the law has declared that the lands may be subjected to the payment of such debts, and has prescribed the manner and time within which it may be done," *Bishop v. O'Conner*, 69 Ill. 431.

As a consequence of the universal subjection of lands in this country to debts, the heir cannot alien land descended, to the prejudice of the ancestor's creditors, *Watkins v. Holman*, 16 Pet. 25; *Elliott v. Moore*, 5 Blackf. 270; *Taylor v. Taylor*, 8 B. Mon. 419; if the heir sell the land he is answerable for the amount received, *Hamilton v. Heirs of Haynes*, Cam. & Nor. 413; and where the ancestor's debts are a lien upon the land, which is the case in most, if not all, of the States, the grantee of the heir will not stand in any better position than the heir, *Austin v. Bailey*, 37 Vt. 219; and may be called to answer the debt, or to contribute if an heir, other than his grantor, has paid the testator's debt, *Graff v. Smith*, 1 Dall. 481; but it is held in Tennessee that if the sale by the heir have been in good faith the alienee has a good title, and the creditor must seek his remedy against the heir personally, *Smith v. Heirs of Thomas*, 14 Lea, 324; and see *Covell v. Weston*, 20 Johns. 414. As the land is liable for debts only in default of personal assets of an intestate, it follows that before the heir can be called upon, in respect to his land, or the land itself attacked, unless it is subject to a special lien, there must be shown an exhaustion of the personal assets, *Reynolds v. May*, 4 G. Greene (Iowa), 283; *Blossom v. Hatfield*, 24 Hun, 275; *Woodfin v. Anderson*, 2 Tenn. Ch. 331; *Nix v. French*, 10 Heisk. 377; in some States, it is held that this exhaustion must appear by an administration of the personal assets, *Chandler v. Chandler*, 78 Ind. 417; *Rinard v. West*, 92 Id. 359; *M'Loud v. Roberts*, 4 H. & M. 443; *Hall v. Bumstead*, 10 Pick. 2. It is not necessary, however, to prove the exhaustion of assets, beyond a reasonable certainty, therefore, when a return of no assets has been made in an action against an administrator it is not necessary to file a bill of discovery against him before proceeding against the land, *Litsey v. Smith*, 10 B. Mon. 74.

In Georgia, land may be charged without making the heir a party to the proceeding, *Telfair v. Stead's Ex'rs*, 2 Cr. 407; but in Mississippi, it has been held that the heir must be a party to a petition by an administrator to sell lands for the intestate's debts, *Hargrove v. Baskin*, 50 Miss. 194.

In Pennsylvania, it is said, *Walker's Appeal*, 1 Grant, 431, that an administrator is not bound to exhaust the personal estate before applying for an order to sell real estate, but, as the order cannot be made without

the exhibition to the court of a full inventory and appraisement, this would seem to make little difference, as the court would apply the rule of priority as to liability; the administrator is not bound to settle his account before making application, *Huckle v. Phillips*, 2 S. & R. 4; *Weaver's Appeal*, 19 Pa. St. 416; *Wall's Appeal*, 31 Id. 62, but where the application comes from a creditor, it is prematurely made and cannot be granted until after a settlement of the administrator's account, *Freno's Estate*, 1 W. N. C. 270.

Where it appears that sufficient personalty to answer debts has come into the administrator's hands, and that he has been guilty of a *devastavit*, wherefrom a deficiency of assets results, the land cannot be held responsible, *Pry's Appeal*, 8 Watts, 253; *Kelly's Estate*, 11 Phila. 100.

The rule that the personal estate must be first resorted to prevails even where the same person is entitled to both the realty and personalty, *Stuart v. Kissam*, 11 Barb. 271; *Mersereau v. Ryerss*, 3 N. Y. 261.

The heir is not personally liable, but only in respect to his land taken by descent, and he is not liable beyond the assets received by him, *Bryan v. Blythe*, 4 Blackf. 249; *Barnetts v. Hayden*, 5 J. J. Mar. 108; *Holder's Heirs v. Mount's Heirs*, 2 Id. 187; *Ellis v. Gosney's Heirs*, 7 Id. 109; *Bedell's Heirs v. Lewis's Heirs*, 4 Id. 562; *Bishop v. Hamilton*, Id. 548; *Ransdell v. Threlkeld's Adm'r*, 4 Bush, 347; *Coyle v. Reynolds*, 7 S. & R. 328; *Coulter v. Selby*, 39 Pa. St. 360; *Tremble v. Heirs of Jones*, 3 Murph. 579; *Payson v. Hadduck*, 8 Biss. 293; *Whitaker v. Young*, 2 Cow. 569; *Green v. Rugely*, 23 Tex. 539; *Williams v. Ewing*, 31 Ark. 229; he does not become personally liable even on a decree *pro confesso*, *Carneal's Heirs v. Day*, 2 Litt. 397; and, except where the question of assets has been put in issue, a decree or judgment should be of assets descended, *Leather's Representative v. Meglasson*, 2 T. B. M. 63; *Roman v. Caldwell's Heirs*, 2 Dana, 20; *Cogwell's Heirs v. Lyon*, 3 J. J. Mar. 39, but to avail himself of the defence of no assets, the heir must plead nothing by descent, *Van Deusen v. Brower*, 6 Cow. 50.

As to the liability of an heir in respect to lands descended to him in another State from that of the intestate, it is held in Massachusetts, that such lands are not assets, *Austin v. Gage*, 9 Mass. 395; in Kentucky, it is held that the inheritance of lands in another State will not render the heir liable for his ancestor's debts, unless it be proved that, in such other State, lands would constitute assets, *Brown v. Bashford*, 11 B. Mon. 67.

As the heir's liability is secondary, he cannot be sued directly for the ancestor's debt, *Phelps v. Miles*, 1 Root, 162, and the debt must be established first against the personal representative, *Reynolds v. May*, 4 G. Greene, 283; but in Connecticut, a proceeding against the heir directly is allowed

where the debt has not accrued until after the expiration of the time for presenting the claim in the probate court, *Davis v. Vansands*, 45 Conn. 600.

. At common law, if the heir had aliened in good faith the lands had by descent before proceedings were commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of the issue of the writ; this was altered by statute of 3 Wm. & Mary, Ch. 14, § 5; 3 Stat. at Large, 482, by which the heir in such case was rendered liable for their value; and in the United States the heir who has sold land may be held liable, *Covell v. Weston*, 20 Johns. 414; *Hamilton v. Heirs of Haynes*, Cam. & Nor. 413.

The value of land as against the heir, whom it is sought to charge, is to be taken as of the time of descent, *Fredericks v. Isenman*, 41 N. J. L. 212.

An heir who pays the debt of his ancestor may enforce contribution by his coheirs, *Taylor v. Taylor*, 8 B. Mon. 419; *Whitaker v. Young*, 2 Cow. 569, and the right of contribution will be extended so as to be enforceable against a purchaser from a heir, *Graff v. Smith*, 1 Dall. 481.

It is held in Texas that an heir may pay the debt of an ancestor without waiting for administration, *Morris v. Halbert*, 36 Tex. 19.

In some States the lien of the testator's debts is limited to a certain time after his death; in such case, after the expiration of the time the heir cannot be troubled.

Shifting Inheritance.

In connection with the question of immediate vesting of an estate upon the death of the ancestor comes the doctrine or theory of a shifting inheritance. This may be stated as follows: if at the death of the ancestor a certain person be heir the estate will vest in him, but if after such vesting there should come into existence another person whose degree of consanguinity to the ancestor is such that, had he been alive at the time of the descent cast, he would have excluded the person who has actually taken, the estate of that person will be divested, and the inheritance will vest in the newly-born heir. Mr. Chitty, in his note to 2 Blackst. Com., 208, note 9, thus puts an example: "As if an estate is given to an only child who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother." COKE'S example is the birth of a son after a descent cast upon a daughter, Co. Litt. 11 b, and St. Germain puts the case of the birth of a brother after a descent to an uncle, Doct. & Stud. Dial. 1, Ch. 7. The example suggested by BLACKSTONE, of the divestiture of the estate of a

collateral by the birth of a posthumous child is hardly a case of a shifting inheritance in the strict sense; since at the time of the father's death the infant *in ventre* was *in esse* and had the right of inheritance, an inchoate right, it is true, and subject to be destroyed by his death unborn, but still a right, and it is questionable how far, in such case where the doctrine of shifting inheritance is acknowledged, the first heir would be permitted to deal with the inheritance as his own, for if he were allowed absolute mastery he might ruin it or sell it, in spite of notice that an heir, whose advent into the world could not long be deferred, existed. The doctrine would seem, although acknowledged in England, to be one the enforcement of which would, here, be productive of great inconvenience, if in every case where a person, of not the nearest possible degree to the decedent, had taken an estate by descent, one desiring to take title from him, were obliged to wait until the possibility of nearer relatives, or of relatives of the same degree, who might share the estate, had been exhausted. The doctrine has not, accordingly, been generally recognized in this country, though we find it upheld in North Carolina, *Cutlar v. Cutlar*, 2 Hawks, 324; *Caldwell v. Black*, 5 Ired. L. 463; *Den d. Seville v. Whedbee*, 1 Dev. L. 160; and Tennessee, *Baker v. Heiskell*, 1 Cold. 642; in the first-named State it has been enforced in favor of the half blood, *supra*.

On the other hand, it has been declared not in force in Illinois, *Bates v. Brown*, 5 Wall. 711; Indiana, *Cox v. Matthews*, 17 Ind. 367; and Ohio. In the last-named State the tendency of the court was at first favorable to the doctrine, and it was upheld in *Dunn v. Evans*, 7 Oh. 169; but that case was overruled in *Drake v. Rogers*, 13 Oh. St. 21, SUTLIFF, C. J., saying: "While therefore our statutory rules of descent reject the canons and supersede the common law rules of inheritance, it seems hardly a logical conclusion that the same statutory rule is to be itself superseded by a common law rule of descent, much less by the doctrine of shifting inheritance, a mere incident of the canons of descent."

Heirship—How Established.

To establish a right of heirship, it is not necessary to prove that the ancestor has died intestate, but those contesting the right of the heir must show the testacy; where the death of the ancestor is shown, there is a presumption of intestacy which prevails until rebutted, *Baxter v. Bradbury*, 20 Me. 260; *Lyon v. Kain*, 36 Ill. 362. The heirship must, however, be proved, and heirship being a question for the court, the claimant must show his relationship and leave the court to decide upon his status, *Birney v. Hann*, 3 A. K. M. 322; he must show not only his relationship, but also

that no relative of the decedent exists who would impede the course of descent to him, *Emerson v. White*, 29 N. H. 482; *Anson v. Stein*, 6 Iowa, 150; or who could effect the quantum of estate coming to him; thus proof by certain persons that they are the only surviving children of the decedent is not sufficient if there were other children, the proof must go further and show the grandchildren, or that there were none, *Skinner v. Fulton*, 39 Ill. 484, and see *Daugherty v. Deardorf*, 107 Ind. 527.

Descent Governed by *Lex Rei Sitæ*.

As a general rule, the law of the country in which the land to descend is situated will govern the question of descent, *McNitt v. Logan*, Litt. Sel. Cas. 60; *Stent v. McLeod*, 2 McCord, Ch. 354; *Jones v. Marable*, 6 Humph. 116; and the law of the domicile of the owner cannot affect the devolution of real estate, *Potter v. Titcomb*, 22 Me. 300; the question so far as it bears on the effect of status acquired extra-territorially has been discussed in connection with the question of the effect of legitimation, and we may note that in *Harvey v. Ball*, 32 Ind. 98, the Supreme Court of Indiana declared that where descent depends upon status the *lex domicilii* must govern. This was, however, mere dictum, for the court allowed a person resident in Pennsylvania and illegitimate there, but who would have been legitimate in Indiana, to inherit lands in Indiana, and justified its action by holding that the Indiana statute did not merely declare a status, but conferred a heritable power on a person born out of wedlock whose parents afterwards married. The result, we think, was right, but the court, or rather two judges of it, for one judge dissented and another did not sit, would seem to have gone to an unnecessary amount of trouble to declare the principle that a foreign status would govern a case of descent, and then to take the case out of it, where to have held the broad principle that descent of land was governed by the *lex rei sitæ* would have been sufficient.

What Passes by Descent as Realty.

In addition to land in the ordinary use of the term the following have been held to pass to the heir and by descent as real estate, or as savoring of the realty; land warrants, *Armstrong v. Campbell*, 3 Yerg. 201; settlement rights, *Lessee of Workman v. Gillespie*, 3 Yeates, 571; a right to a land certificate under the Act of Congress of May 23, 1828, *Shanks v. Lucas*, 4 Blackf. 476; an inchoate right afterwards perfected by a patent to the heirs, *Frizzle v. Veach*, 1 Dana, 211; lands located and surveyed by the ancestor although patented to the heirs, *Lessee of Bond v. Swear-*

ingen, 1 Ohio, 395; an inchoate right by entry and survey, *Morrison v. Campbell*, 2 Rand. 206; an equitable title, *Roup v. Bradner*, 26 N. Y., S. C. 513. A contract for the purchase of land will pass to the heir, *Champion v. Brown*, 6 Johns. Ch. 398; *Griffith v. Beecher*, 10 Barb. 432, hence the administrator of the decedent cannot assign the contract or compel its performance, but the heirs may call upon the executor or administrator to complete the contract upon the decedent's side so as to entitle the heirs to call for a conveyance, *Champion v. Brown, supra*.

Statutory Order of Descent.

To conclude this note we subjoin an abstract of the order of descent established by the statutes of the various States, in referring to which it is to be borne in mind that all the inheritances are subject to dower and courtesy, or to what has been given, either by law or agreement, in lieu of them in those States in which they have been abolished, for which see Vol. I., and that unless it is otherwise specified each class of heirs is to be taken as extinct before the next mentioned can inherit.

Alabama.—(1) The children of the intestate, or their descendants, in equal parts, (2) the brothers and sisters, and their descendants, in equal parts, (3) the father if living, if he be not living, the mother, (4) the next of kin in equal degree in equal parts, Code (1876), § 2252.

Arkansas.—In parcenary, (1) the children, or their descendants, in equal parts, (2) the father, the mother, the brother and sister, or their descendants, in equal parts, (3) the grandfather, grandmother, uncles and aunts and their descendants in equal parts and so on in other cases without end, passing to the nearest lineal ancestors and their children and their descendants in equal parts, Digest (1884), § 2522.

California.—(1) In equal shares to the husband, or wife, and child, if there be but one child, or its issue; (2) if more than one child or one child and the issue of one or more, one-third to the wife or husband, and the rest to the children and their issue in equal shares, representation being observed; if no child, the children's shares to all of the decedent's lineal descendants, if all in equal degree *per capita*, otherwise *per stirpes*; (3) if no surviving husband or wife, the entire estate to the issue, representation being observed if the issue include a child or children of the decedent; (4) if no issue, to the husband or wife and to the father, equally, if no father, his half to the brothers and sisters of the decedent and their issue, if a mother be left, she takes an equal share with the brothers and sisters; (5) if no issue, husband or wife, the entire estate to the father; (6) if none of the foregoing, then to the brothers and sisters and their issue by representa-

tion in equal shares, if a mother survive, she to take an equal share with the brothers and sisters; (7) if no issue, husband or wife, father, brothers or sisters, to the mother to the exclusion of the issue of brothers and sisters; (8) if no father, mother, brothers or sisters, to the husband or wife; (9) if no issue, father, mother, sister, brother, husband or wife, to the next of kin in equal degree, excepting that where there are two or more collateral kindred who are in equal degree but claim through different ancestors, those claiming through the nearer ancestor are preferred; if, however, the decedent leave several children or one child and the issue of one or more children, and a surviving child die under age and unmarried, all the estate that came to the deceased child by inheritance from the deceased parent descends in equal parts to the other children and the issue of such as are dead; if on the death of such child all the other children of the same parents are dead and any have left issue, the share aforesaid descends to the said issue, if of the same degree of kindred *per capita*, otherwise *per stirpes*; (10) if none of the foregoing kindred exist the estate escheats for the support of common schools, Civil Code (Hittell, 1876), 1st par. § 6386.

Under the peculiar provision of this Act (or rather of that of which it is a re-enactment, viz., the Act of May 1, 1851, § 264) it has been held that where a wife died leaving a husband and two minor children, a boy and a girl, and the boy died unmarried and still a minor, his estate passed to his sister and not to the father, on the ground that the provision for the descent of an unmarried minor's estate was an exception to the general rule and not a contradiction thereof, *Estate of De Castro v. Barry*, 18 Cal. 96; it may be added, that, even if it were to be considered that a contradiction existed, the law would now in California be the same, in view of the provision of the Political Code that in case of a conflict between different sections of the same chapter or article, that last in numerical order must prevail, unless to so construe the article or chapter would be inconsistent with its meaning, Pol. Code, § par. 4484.

The provision for the descent of a minor child's share is strictly limited to what is taken by inheritance, and this, it seems, has not been allowed to be controlled by the principle that where one is given by a devise exactly what he would have taken by descent in case of an intestacy, he will be in by descent as by the worthier title; thus in the *Estate of Donahue*, 36 Cal. 329, one James Donahue had devised to his wife one-third of his estate and to his minor children the remaining two-thirds—on the death of one of the minors, unmarried, it was held that the estate of the minor should be distributed as if it had come to him by purchase. The report does not give the argument of counsel; and SAWYER, C. J., in delivering the opinion of the court, nowhere refers to the principle above suggested.

It is also held that to enable nephews and nieces to take where a wife is living, and no issue or father or mother survive, a brother or sister of the decedent must survive to take with them, and where such is not the case the entire estate will pass to the wife to the exclusion of the nieces and nephews, *Estate of Linehan*, Myrick Prob. 83.

Colorado.—(1) One-half to the husband or wife and one-half to the children and the descendants of deceased children; if no children or descendants, the entire estate to the husband or wife; (2) to the children and descendants of children, taking *per stirpes*; (3) to the father; (4) to the mother; (5) to the brothers and sisters and their descendants *per stirpes*; (6) to the grandfather, grandmother, uncles, aunts and their descendants *per stirpes*; (7) to the nearest lineal ancestors and their descendants *per stirpes*, Gen. St. (1883), par. 1039, p. 384.

The property of a bastard goes (1) to his wife and children and their descendants, as in the case of a legitimate person; (2) one-half to his mother, and one-half to her children and their descendants *per stirpes*; (3) to the next of kin to the mother, Id. par. 1048, p. 386.

Connecticut.—Realty and personalty are thrown together, and after giving to the widow a third of the personalty and her dower, the mass is distributed as follows: (1) to the children and their issue, the estate to be so divided that the male heirs shall have their part in the real estate, unless the court shall find that the heirs, male and female, will be best accommodated otherwise, if it appear that the realty cannot well be divided the whole to be set to the eldest son if he will accept it, paying to the other children their shares of the true value of such estate, if he refuse, the estate to be offered to the other sons successively. If a minor heir die before marriage and settlement his portion is to be divided amongst the surviving children and their representatives. (2) If no children or representatives thereof—one-half of the personalty and a life-estate in one-third of the realty to the wife, and the residue to the brothers and sisters; if no wife, the whole to the brothers and sisters of the whole blood and representatives; if no such kindred, then to the parents; if no parents, then to the brothers and sisters of the half blood and representatives; in default of them, to the next of kin in equal degree. The estate of a minor who leaves no issue, or brothers or sisters of the whole blood, or descendants of them, or any parent, goes to the next of kin of the intestate of the blood of the person from whom the estate descended, and if there be no such kindred then to the next of kin of the intestate generally, Gen. Stat. (1875), Tit. 18, Ch. 11, Art. 2, §§ 6, 7, 8.

It may be noted that the blending of personalty and realty by the statute is only *sub modo*, accordingly it is held that while the Act of 1866,

which forms part of § 8, *supra*, permits a father to take by inheritance personality it does not permit him to take realty derived *ex parte materna*, *Austin v. Wight*, 38 Conn. 405.

Delaware.—(1) In equal shares to the children and lawful issue by representation ; (2) to brothers and sisters and issue by representation, the whole blood being preferred to the half blood, and, in lands acquired by descent or devise from an ancestor, the descent to be first to the brothers and sisters and their issue of the blood of the ancestor ; (3) to the father ; (4) to the mother ; (5) to the next of kin in equal degree and lawful issue by representation, provided that collateral kindred claiming through a nearer common ancestor shall be preferred to those claiming through a more remote common ancestor, Rev. Code (1874) Ch. 85, § 1, p. 514.

The estate of a bastard dying without lawful issue, passes to his mother, and if she be not living to her lawful issue, Laws of Del., Vol. 2, Ch. 243.

Florida.—(1) Children and descendants ; (2) the father ; (3) the mother ; (4) brothers and sisters and descendants ; (5) the estate to be divided into moieties and to go to the paternal and maternal kindred, one moiety to each as follows: to the grandfather, the grandmother, uncles and aunts on the same side and their descendants; to the great-grandfather; to the great-grandmother, and the brothers and sisters of such great-grandparents and their descendants; and so on, the estate passing to the nearest lineal male ancestors and for want of them to the lineal female ancestors in the same degree, and the descendants of such male and female ancestors, McClell. Dig. (1881), Ch. 92, § 1, p. 468.

Where an infant, entitled to land derived from the father, dies without issue, the estate descends in the line from which it was derived, without reference to the existence of kindred of the other line, Id. § 2.

Where the estate is directed to go by moieties to the paternal and maternal kindred, and either line is extinct, the other line may take the whole ; if there be no kindred the husband or wife may take, or, if he or she be dead, his or her kindred as though he or she had survived the intestate, Id. § 3.

Georgia.—The husband is sole heir of an intestate wife, except where she leaves a separate estate, in which case it is to be divided between the husband and the children and descendants of children, the husband and children taking *per capita*, the descendants *per stirpes*. If an intestate die without children or descendants of children, the wife is the sole heir ; if there be children the estate descends to them and the wife *per capita*, unless the shares exceed five, when the wife takes one-fifth ; this provision is in lieu of dower, if she take dower she cannot claim as heir. In default of a widow, children and representatives, the brothers and sisters of the intestate take.

The father if living takes an equal share with the brothers and sisters; if there be no father, the mother, if a widow, takes the share a father would have taken, if she be not a widow, she can take only in case the intestate happens to be her only or last surviving child. In inheritance by brothers and sisters, the half blood of the paternal side take equally with the whole blood; if there be no brothers or sisters of the whole or paternal half blood, the mother and half blood inherit. In all degrees more remote than the foregoing and the children or grandchildren of brothers and sisters, the paternal and maternal next of kin stand on an equal footing. Uncles and aunts inherit equally with first cousins, Code (1882), § 2484, p. 609.

Illinois.—(1) To children and descendants in equal parts, by representation; (2) if no widow or surviving husband, to parents, brothers and sisters and descendants, allowing each of the parents, if living, a double share; if no parent be living, then to brothers and sisters and their descendants; (3) if there be a widow or surviving husband, one-half of the realty to the widow or surviving husband, the other half in the ordinary course of descent, where there are no lineal descendants of the decedent; (4) to the next of kin, computing by civil law rules; (5) if there be a widow or surviving husband and no kindred, the entire estate to such widow or husband, Rev. Stat. (1883, Hurd), Ch. 39, Art. 1, § 1, p. 438.

Indiana.—(1) To children, equally, and descendants by representation; (2) one-half to the father and mother jointly or to the survivor, the other half to brothers and sisters and their descendants; if there be no parents, the whole to the brothers and sisters as tenants in common; if no brothers or sisters or representatives, the whole to the parents jointly or to the surviving parent; (3) if the estate be a paternal ancestral estate, (a) to the paternal grandfather and grandmother as joint tenants or to the survivor if but one be living; (b) to the paternal uncles and aunts or their representatives; (c) to the next of paternal kin; (d) to the maternal kindred in the same order;—if a maternal ancestral estate, to the maternal blood in the same order and in default thereof to the paternal; if the estate be non-ancestral, one-half to each line in the order above set forth, either line, on failure of the other, taking the whole, Rev. Stat. §§ 2467-2471. An estate conveyed in consideration of love and affection, on failure of lineal issue at the death of the grantee reverts to the donor, saving the rights of the widow or widower, Id. § 2473; see *Mitchell v. Parkhurst*, 17 Ind. 146.

If a widow having children remarry, the realty which came to her by virtue of the former marriage cannot be aliened by her, if there be alive children of said marriage, unless the said children be of the age of twenty-one years and join in the conveyance, and on the death of the widow the said realty will go to the children of the marriage through which the

realty came to her, R. S. § 2484; see *Ogle v. Stoops*, 11 Ind. 380; *Jackson v. Finch*, 27 Id. 316; *Louden v. James*, 31 Id. 69; *Smith v. Smith*, 23 Id. 202; *Thorp v. Haines*, 107 Ind. 324; if there be no children or descendants thereof, the widow may alien the property irrespective of the manner in which she has derived title, *McKinney v. Smith*, 106 Ind. 404; the existence of an adopted child, it seems, will not restrict the widow's power of alienation, *Barnes v. Allen*, 25 Id. 222; *Isenhour v. Isenhour*, 52 Id. 328.

Iowa.—(1) To children and their representatives; (2) one-half to the parents, or parent if one only survive, the other half to the wife, if no wife, all to the parents or parent; if both parents be dead, their portion is disposed of in like manner as though they had died possessed of their shares, and so on through ascending ancestors and their issue; (3) if no heirs be thus found, to the wife or her heirs, if the intestate has had more than one wife who either died or survived in lawful wedlock, the estate to be equally divided between the living wife and the heirs of the deceased wife; or amongst the heirs of all if all be dead, by right of representation, Rev. Code, §§ 2453–2458.

Under the provisions for inheritance by the parents, it is held that if both parents be dead, the portions which would have fallen to them, if both had survived, are to be disposed of as though such survival had taken place, *Bassil v. Loffer*, 38 Iowa, 451; *Moore v. Weaver*, 53 Id. 11.

Kansas.—(1) To the children in equal shares, their heirs taking by representation; (2) to the wife; (3) to the parents or the survivor of them; (4) if both parents be dead, as if the parents had survived the intestate and died in the possession of their shares, and so on through ascending ancestors and their issue, Comp. Laws (Dassler, 1885), Ch. 33, §§ 18–21. Under this law the brothers and sisters of a decedent will take not as heirs of the decedent directly, but as heirs of the father, see *McKinney v. Stewart*, 5 Kan. 384.

Kentucky.—(1) To the children and their descendants; (2) to the father and mother, if both be living, each a moiety; if the father be dead, his moiety to the brothers and sisters, and their descendants; if none of the latter class survive, all to the mother; if the mother be dead, all to the father; (3) if no father or mother, to brothers and sisters; (4) one moiety to the paternal and the other to the maternal kindred, in the following order: to the grandfather and grandmother equally or to the survivor; to uncles and aunts and their descendants; to the great grandfathers and grandmothers; to the brothers and sisters of the grandparents and their descendants; and so on without end, passing to the nearest lineal ancestors and their descendants. If there be no kindred of one line, the other

line takes all; if there be none of either line, the whole to the surviving wife or husband; if the husband or wife have died before the intestate, then to his or her kindred, as if he or she had survived the intestate and died entitled to the estate, Gen. Stat. (Bul. & Fel.), Ch. 31, § 1, pp. 369—70, as amended by Act February 9, 1874, p. 929. An estate of inheritance, the gift of a parent of the intestate, will on his death without issue revert to the donor, Id. § 8, p. 370.

If an infant die without issue, having an ancestral estate from one of his parents, the estate will descend to such parent and his or her kindred, if any there be, if not, then to the other parent and his or her kindred; but the latter line is not excluded where the kindred of the other line are more remote than a grandfather, uncle, or aunt of the intestate and their descendants, Ch. 31, § 9. This provision is strictly confined to the case of infant intestates, see *Duncan v. Lafferty*, 6 J. J. M. 46; and it would seem that the provision in case of a gift from a parent must be strictly limited to a father or mother, and will not be extended so as to mean a provision *ex parte aut linea materna aut paterna*, *Turner v. Patterson*, 5 Dana, 292; thus in *Wells's Heirs v. Head*, 12 B. Mon. 166, and *Smith's Ex'r v. Smith*, 2 Bush, 520, where an infant decedent had inherited its estate from the maternal grandmother the father was held not excluded, and see *Driskell v. Hanks*, 18 B. Mon. 855; *Smith's Ex'r v. Smith*, *supra*, and in cases of inheritance from an infant, the rule that the relations of the half blood take half portions (see *ante*, p. 428) prevails, *Talbott's Heirs v. Talbott's Heirs*, 17 B. Mon. 1, in which case it was argued on the one side that intention of the Act was to place the estate of the infant for purposes of descent in the position in which it would have been had the infant predeceased the father, and so to make it descendible lineally, and on the other that it was not intended to alter the character of the descendants by converting collaterals into lineals, but that the language "to that parent and to his or her kindred" merely imported a restriction of descendants, leaving their qualification in other respects as in ordinary cases. The court held the latter view the correct one, saying: "In the absence of the father, who first takes, his children do not take from the father, but directly from the infant. They do not take as lineals, but through the common ancestor as collaterals on the father's side."

Louisiana.—(1) To children or their descendants, *per capita* when in same degree *per stirpes* when all or part take by representation; (2) if no descendants, one-half to the father and mother equally, one-half to brothers and sisters and their descendants; if either father or mother be dead, his or her share to the brothers and sisters or their descendants; (3) to the

ascendants, one-half to the paternal line the other half to the maternal line, the ascendants taking *per capita*, but if there be in the nearest degree but one ascendant in the two lines he takes to the exclusion of all others; an ascendant will also take, to the exclusion of all others, immovables given by him to his children or more remote descendants who die without issue, still possessed of said immovables, or, if the immovables have been alienated and the price in whole or in part is still due, the price thereof; (4) to collateral relatives according to degree, Civil Code (1875), Arts. 902-908, 911, 912, 914.

Maine.—(1) To children and their issue by right of representation, if no child be living, to all lineal descendants, *per capita* if of equal degree, otherwise *per stirpes*; (2) to the father; (3) to the mother, brothers and sisters in equal shares and to the issue of deceased brothers and sisters by representation; (4) if there be no brothers and sisters, to the mother in exclusion of the issue of deceased brothers and sisters; (5) to the next of kin in equal degree, when they claim through different ancestors those who claim through the nearer ancestor to be preferred; (6) to the wife or husband.

The estate of an unmarried minor, inherited from either of his parents, descends to the other children of the same parent and the issue of those deceased, in equal shares if all of the same degree, otherwise *per stirpes*, Rev. St. (1883), Ch. 75, § 1.

Maryland.—(1) To children and descendants; (2) if the estate have descended on the part of the father, to the father; (3) to the brothers and sisters of the blood of the father and their descendants; (4) to the paternal grandfather; (5) to his descendants; (6) to the paternal great-grandfather and his descendants, and so on, passing to the next lineal male paternal ancestor and, if none such be found, to his descendants in equal degree; (7) if no paternal ancestor or descendant therefrom, to the mother of the intestate; (8) to her descendants; (9) to the maternal ancestors in the same order as directed by the paternal ancestors. If the estate have descended on the part of the mother, then, in default of children and their descendants, to the mother and to her kindred in like manner as above directed as to the paternal ancestors in the case of the paternal estate, the father and paternal relatives taking in the default of the maternal line.

If the estate have come to the intestate by purchase or in any other way than by descent as above, then, in default of lineal descendants, (1) to the brothers and sisters of the whole blood and their descendants in equal degrees equally; (2) to the brothers and sisters of the half blood and their descendants in like manner; (3) to the father; (4) to the mother; (5) to the paternal grandfather and his descendants; (6) to the maternal

grandfather and his descendants, and so on, alternating the next male paternal ancestor and his descendants with the maternal ancestor of the same degree and descendants, giving preference to the paternal ancestor and his descendants.

If no kindred aforesaid, to the husband or wife; and if he or she be dead, then as if he or she had survived and died entitled to the estate, if there have been more than one husband or wife and all be dead, then to their kindred in equal degree equally, R. C. (1878), Art. 47, § 1.

In the statute "on the part of the father" is given the construction "from the line of the father," *Stewart v. Evans*, 3 H. & J. 287, and hence a descent from a sister to a brother where the heritable blood was derived through the father was held to be a descent *ex parte paterna*, *Stewart's Heirs v. Jones*, 8 G. & J. 1. Purchase is taken in its technical sense so as to include a devise, *Hall v. Jacobs*, 4 H. & J. 245.

Massachusetts.—(1) To the children and descendants by the right of representation; if no child, then to all other lineal descendants, equally if in equal degree, otherwise *per stirpes*; (2) to the father and mother in equal shares; if no mother, all to the father; if no father, all to the mother; (3) to the brothers and sisters and issue, with a like provision as to representation and taking *per capita* or *per stirpes* as in the case of lineal descent; (4) to the next of kin in equal degree, except that where two or more collateral kindred in equal degree claim through different ancestors, those claiming through the nearest ancestor are preferred, Pub. Stat. Ch. 125, § 1, p. 743.

Under this last provision, it is held that where persons claim from a more remote ancestor by right of representation through a nearer one they cannot be regarded as taking from the latter; thus, where children took by representation of a deceased father an estate belonging to the grandmother, it was held that the children took directly from the latter, the representation of the mother availing only to fix the share to be inherited, *Sedgwick v. Minot*, 6 Allen, 171.

Michigan.—(1) In equal shares to the children and issue of deceased children; if no children be living, then to lineal descendants, if all of the same degree *per capita*, otherwise *per stirpes*; (2) to the widow for life; after her decease to the father; if no widow, to the father immediately; (3) to the brothers and sisters and children of deceased brothers or sisters, provided that if there be a mother she shall take an equal share with the brothers and sisters; (4) if no brother or sister, to the mother to the exclusion of brothers' and sisters' children; (5) to the next of kin in equal degrees, except that when two or more of equal degree claim through different ancestors, those claiming through the nearest ancestor are preferred; provided,

that where a person dies leaving several children, or a child and the issue of deceased children, and any such child dies unmarried and under age, his or her share, derived from the parent, descends to his or her brothers and sisters, or their issue; if there be no brothers and sisters living at the death of the child then the issue of the deceased brothers and sisters will take, if in equal degree *per capita*, otherwise *per stirpes*; (6) if an intestate leave no lineal descendants, father, mother, brother or sister, or issue of brother or sister, to the widow or surviving husband, if any, Annotated Stats. (Howell, 1882), Ch. 219, § 5772 *a*.

Minnesota.—(1) To the children and issue; (2) to the father; (3) one-third to the mother, the rest to brothers and sisters; (4) if no brothers or sisters, all to the mother; (5) if no mother, all to the brothers and sisters and representatives; (6) to next of kin, with preference, as between those of equal degree, to those claiming through the nearest ancestor; the same provision is made in case of the death of a minor child who has inherited from his parent, as in Michigan; (7) if no kindred, to the surviving husband or wife, Gen. Stat. (1878), Ch. 46, § 3.

Mississippi.—(1) To the children and their descendants, the wife or husband taking with the children a child's share; (2) to the brothers and sisters and their descendants; (3) to the father and mother in equal parts; if either be dead, the whole to the one surviving; (4) to the next of kin in equal degree, Rev. Code, 1880, § 1271. Where there are no children of the intestate, the surviving wife or husband is entitled to the entire estate, Code (1880), § 1171.

Missouri.—(1) To the children and their descendants; (2) to the father, mother, brothers and sisters and their descendants in equal parts; (3) to the husband or wife; (4) to the grandfather, grandmother, uncles and aunts and their descendants; (5) to the great-grandparents and descendants, and so on, passing to the nearest lineal ancestors and their children and descendants, in equal parts; (6) if there be no kindred of the intestate, then the kindred of the husband or wife take as though the husband or wife had survived the intestate and died entitled to the estate, Rev. Stat. §§ 2161, 2163.

Nebraska.—The law of descent is the same as in Michigan, except with reference to the last provision, which in Nebraska is that when the intestate leaves a widow and no kindred, the estate shall go to the widow, Comp. Stat. Ch. 23, § 30, p. 289.

Nevada.—(1) One-half to the husband or wife and one-half to the child, if one only, and its representatives; if more than one child, one-third to the husband or wife and the rest to the children and their representatives; (2) if no child be living, the descendants of the intestate take, *per*

capita if in equal degree, otherwise *per stirpes*; (2) to the father and the husband or wife equally; if there be no surviving husband or wife, all to the father; (3) to the brothers and sisters or their children by right of representation, provided that if there be a mother she shall take an equal share with the brothers and sisters; (4) if no brothers and sisters, to the mother to the exclusion of the issue of brothers and sisters; (5) to the surviving husband or wife; (6) to the collateral kindred in equal degree, except that those claiming through the nearest ancestor are to be preferred. The same provision is made in case of the death of a minor child, who has inherited from his parent, as in Michigan, Comp. Laws, § 794, p. 194.

New Hampshire.—(1) To the children and representatives; (2) to the father; (3) in equal shares to the mother, brothers and sisters or their representatives; (4) to next of kin in equal shares. If a person die under age and unmarried, his estate derived by descent or devise from his father or mother descends to his brothers and sisters or their representatives, to the exclusion of the other parent, Gen. Laws (1878), Ch. 203, §§ 1, 2, pp. 476, 477. The brothers and sisters last mentioned are held to be the brothers and sisters of the whole blood only, see *Clark v. Pickering*, 16 N. H. 284; but where the minor intestate is an only child, then, in default of a father, the mother will take and the estate will follow the general course of descent, the particular course having become impossible, *Kelsey v. Hardy*, 20 N. H. 479.

New Jersey.—(1) To the children and representatives; (2) to the brothers and sisters of the whole blood and their representatives; (3) to the father, unless the estate came to the decedent on the part of the mother, by descent, gift or devise, in which case it descends as though the decedent had survived the father; (4) to the mother for life, and on her death, as though the intestate had died without leaving a mother capable of inheriting; (5) to the half blood, Rev. St. (1877), p. 297, pl. 1, 2, 3; p. 298, pl. 4, 5; Act Ap. 16, 1846, §§ 1-5.

New York.—(1) To lineal descendants; (2) to the father, unless the estate came to the intestate on the part of the mother and she be living, if she be dead, then the estate so derived to the father for life with reversion to the brothers and sisters and their descendants, if no brothers and sisters or descendants thereof, to the father in fee; (3) to the mother for life with reversion to the brothers and sisters and descendants; if there be no brothers or sisters or their descendants, to the mother in fee; (4) to the brothers and sisters and their descendants; (5) if the estate have come on the part of the father; (a) to the paternal aunts and uncles and representatives; (b) to the maternal aunts and uncles and representatives; if

the estate have come on the part of the mother, in the same order, substituting the maternal for the paternal line in order of precedence; (6) if the estate have not come on the part of either father or mother, to the maternal and paternal aunts equally and their descendants, Rev. Stat. (Throop, 1882), Pt. 2, Ch. 2, §§ 1-13, pp. 2210-2212. The expression "on the part of the mother" has been interpreted to include cases in which the estate has come by gift or devise from a maternal ancestor, as well as where it has come by descent through the mother, the court being aided in its interpretation by the statute bearing upon the exclusion of the half blood, *Torrey v. Shaw*, 3 Edw. Ch. 356; *Morris v. Ward*, 36 N. Y. 587.

North Carolina.—(1) To lineal descendants; (2) to collaterals of the blood of the ancestor from whom the estate has been derived; (3) where the estate has not been so derived, to collaterals generally, and so in the case of an ancestral estate where the ancestral blood is extinct. If no issue or brothers or sisters or issue thereof are living, the father or, if he be dead, the mother will take. In default of any of the foregoing relatives the widow takes, Code (1883), Ch. 28, § 1281, Rules, 1, 4, 5, 6, 8.

Ohio.—I. Where estate or gift came from an ancestor by descent, devise or deed, (1) to the children or their representatives; (2) to the husband or wife for life; (3) on death of such husband or wife or in default thereof, to the brothers and sisters of the blood of the ancestor or their legal representatives; (4) to the ancestor, if living; (5) to the children of such ancestor or their representatives; (6) to the husband or wife of such ancestor, if a parent of the decedent, for life, and on his or her death, or in default thereof, to the brothers and sisters of the ancestor and their representatives; (7) to the brothers and sisters of the half blood of the decedent, although not of the blood of the ancestor; (8) to the next of kin of the intestate of the blood of the ancestor; (9) to the husband or wife in fee; (10) to the next of kin of the intestate though not of the blood of the ancestor. II. If the estate have not come by descent, devise or deed of gift, (1) to the children and representatives; (2) to the husband or wife for life; (3) on death, or in default, of husband or wife, to the brothers and sisters of the whole blood and their representatives; (4) to the brothers and sisters of the half blood and their representatives; (5) to the father; (6) to the mother; (7) to the next of kin. In default of the foregoing, the estate, no matter how acquired, will pass, (1) to the children of any deceased husband or husbands, wife or wives of the intestate, whose marriage was not annulled prior to his, her or their death, or their representatives; (2) to the brothers and sisters of such husband or wife or their representatives, Rev. St. (1884), §§ 4158, 4159,

4160, 4161. III. If the estate came from a former husband or wife, then, in case of the death of the relict without issue, (1) to the children of the deceased husband or wife or their representatives; (2) one-half to the brothers and sisters of the intestate or their representatives and one-half to the brothers and sisters of the deceased husband or wife or their representatives, § 4162 as amended April 6, 1881; see R. S., Vol. III., p. 210.

The "ancestor" in the statute means the relative from whom the estate was immediately derived, *Lessee of Prickett v. Parker*, 3 Oh. St. 394.

Oregon.—(1) To the lineal descendants; (2) to the wife; (3) to the father; (4) to the brothers and sisters and the representatives and issue of deceased brothers or sisters; if a mother be living she will take an equal share; (5) if no brothers or sisters be living, to the mother, to the exclusion of the issue of deceased brothers and sisters; (6) to next of kin in equal degree, those claiming through the nearest ancestor being preferred. There is the same provision for the descent of the share of an unmarried minor as in Michigan, Gen. Laws (1872), Mis. Laws, Ch. 10, Tit. 1, §§ 1-6, p. 547.

Pennsylvania.—Subject to the widow's dower of one-third or, if there be no issue, of one-half for life, and to the estate by the courtesy, (1) to the children and issue by representation; (2) to the father and mother for their joint lives, or to the survivor; (3) to the brothers and sisters of the whole blood and representatives; (4) to the father and mother in fee; (5) to the brothers and sisters of the half blood and their representatives; (6) to the next of kin of the intestate; (7) to the husband or wife, Act 8 April, 1833, P. L. 316.

Under the last provision it is held that where an intestate dies leaving a widow and a mother and no other kin, the widow will on the expiration of the mother's life estate take the fee, *Broad Top Coal Co. v. Riddlesburg Coal Co.*, 65 Pa. St. 435.

Rhode Island.—(1) To the children and their descendants; (2) to the father; (3) to the mother, brothers and sisters and representatives; (4) in moieties, to the paternal and maternal kindred as follows: (5) to the grandfather; (6) to the grandmother, uncles and aunts and their representatives; (7) to the great-grandfather or fathers; (8) to the great-grandmothers and the brothers and sisters of grandparents and descendants, and so on, passing to the nearest lineal male and, for want thereof, to the nearest lineal female ancestor in the same degree and their descendants, Pub. Stat. (1882), Ch. I87, §§ 1, 2, p. 489. In default of either line, the other takes, in default of both, the husband or wife takes, or, if he or she be dead, his or her kin, as though he or she had survived the intestate and died possessed, Id. § 4, p. 490.

Under the provision for the division of the estate into moieties, it is held that there can be no preference of one line over the other, but that so long as there is any kindred, no matter how remote, on the part of both lines the inheritance cannot become reunited, *Cozzens v. Joslin*, 1 R. I. 122.

South Carolina.—(1) One-third to the widow, the rest to the children or representatives; (2) if there be no lineal descendants, one-half to the widow, the other half equally to the father, or, if he be dead, the mother, and the brothers and sisters of whole blood or their children; (3) one-half to the widow, the other half to the brothers and sisters; (4) one-half to the widow, the other moiety equally divided amongst the brothers and sisters of the half blood and the children of brothers and sisters of the whole blood, the children of each such brother and sister taking a share equal to the share of a brother or sister of the half blood; if there be no brother or sister of the half blood, then a moiety to the children of the deceased brothers and sisters of the whole blood; if there be no such children, then the moiety to the brothers and sisters of the half blood; (5) to the widow and the lineal ancestor, each a moiety; (6) two-thirds to the widow, the rest to the next of kin; (7) if there be no widow, the portion allotted her follows the course of descent of the rest of the estate. The estate of a married woman will descend as above, substituting the husband for the widow. If a married person die without kindred, the husband or wife takes the entire estate, Gen. Stat. (1882), § 1845.

Tennessee.—I. (1) To the children and their descendants, if there be no issue, or brothers or sisters or their issue, to the surviving parent; *if the estate were acquired by the decedent*; (2) to the brothers and sisters of the whole blood, born before or after the decedent's death, and their issue; (3) to the father and mother as tenants in common; (4) in equal moieties to the heirs of the father and mother, in equal degree or representing those in equal degree of relationship to the intestate, but if such heirs or those whom they represent do not stand in an equal degree of relationship to the intestate, the heirs nearest in blood to the intestate or their representatives are preferred; *if the estate came by gift, devise or descent from a parent or the ancestor of a parent*; (2) to the brothers and sisters of the blood of the ancestor, until exhausted, in preference to the other line; (3) to the parent from whom or whose ancestors it came, in preference to the other parent; (4) if both parents be dead, to the heirs of the parent from whom or whose ancestor it came; (5) to the husband or wife, Code, §§ 3268–3272. The mother is not cut off from inheritance of an estate derived *ex parte paterna*, she is merely postponed, and therefore, where there is no issue, brother, sister or father, the mother will take, *Towls v. Rains*, 2 Heisk. 355; and the term “ancestor” has been strictly construed

and not given the loose meaning it has received in some other States, hence, where a maternal grandfather left property which vested in a grandchild, and on his death in a sister of the half blood, by inheritance, it was held that the estate would pass as an acquired and not as an ancestral one, *Wills of John D. and Jos. Miller*, 2 Lea, 54.

Texas.—(1) To the children and descendants; (2) to the father and mother in equal portions; (3) if one parent only survive, half to the parent and half to brothers and sisters or descendants; if there be no brothers or sisters or their descendants, to the surviving parent; (4) to the brothers and sisters and their descendants; (5) in moieties to the paternal and maternal kindred, as follows: to the grandfather and grandmother in equal portions, but if one only be living, one portion to the grandparent the other to the descendants of the deceased grandparent, if there be no grandparent, then to their descendants, and so on, passing in like manner to the nearest lineal ancestors and their descendants. If the deceased leave a wife, (1) to the wife one-third for life, the rest to the children; (2) if there be no children, one-half to the wife in fee, the rest according to the course above set out; but if the decedent leave neither father nor mother, brothers or sisters or their descendants, the whole estate to the wife, Rev. Stat. (1879), Arts. 1645, 1646.

Vermont.—(1) To the children and their descendants; (2) if there be no issue and the husband or wife do not elect courtesy or dower, the whole of the decedent's estate to the husband or wife if its value do not exceed \$2000; if it exceed \$2000, then \$2000 and one-half the remainder of the estate to the wife or husband and the rest as though there were no surviving husband or wife, but if the decedent have no kindred capable of inheriting the estate, the whole to the husband or wife; (3) to the father; (4) to the brothers and sisters and their representatives; if the mother survive, she will have a brother's or sister's share; (5) to the next of kin in equal degree, but no person is entitled by right of representation to the share of the next of kin who has died, Rev. Laws (1880), § 2230.

Virginia.—(1) To the children and descendants; (2) to the father; (3) to the mother, brothers and sisters and their descendants; (4) one moiety to the paternal and the other to the maternal kindred, as follows: (5) to the grandfather; (6) to the grandmother, uncles and aunts on the same side and their descendants; (7) to the great-grandfathers or father; (8) to the great-grandmothers, or mother and grandaunts and uncles and their descendants—and so on, passing to the nearest lineal male ancestors, and for want of them to the nearest lineal female ancestors in the same degree, and their descendants. If one line fail the other will take both moieties, if both fail the estate goes (9) to the husband or wife of the intestate, or if he

or she be dead, to his or her kindred, as though he or she had survived the intestate and died possessed of the estate, Code (1880), Ch. 119, § 1. If an infant die, without issue, having title to real estate derived by gift, devise or descent from one of his parents, the estate will descend wholly to his kindred upon the side of that parent, if there be none such then to his kindred upon the other side, Id. § 9.

West Virginia.—The rule of descent is same as Virginia, Rev. Stat. (1879), Ch. 66, §§ 1, 9.

The provision for the descent from the parent in the case of an infant's estate is strictly confined to a descent *from* the parent and will not be extended to cover a case in which the infant has taken from an ancestor collateral or lineal *through* the deceased parent by representation, *Owen v. Cogbill*, 4 H. & M. 487.

Wisconsin.—(1) To the children and descendants; (2) to the widow or the surviving husband; (3) to the parents or the survivor of them; (4) to the brothers and sisters and their representatives; (5) to the next of kin in equal degree; where there are two or more claiming through different ancestors those claiming through the nearest ancestor preferred. There is the same provision for the descent of an infant's estate derived from a deceased parent as in Michigan. Rev. Stat. (1878), Ch. 102, § 2270.

With regard to a homestead it is provided that it shall go (1) if there be no issue, to the widow; (2) if there be a widow and issue, to the widow *durante viduitate*, with remainder to the heirs of the intestate; (3) if there be issue and no widow, or no issue and no widow, it will descend as an ordinary estate, Id. § 2271.

Escheat.

PATIENCE MONTGOMERY v. JOHN B. DORION.

Superior Court of Judicature of New Hampshire, Grafton, July Term, 1835.

[Reported in 7 New Hampshire Reports, p. 475.]

An alien cannot take lands by descent. But he may take by purchase and hold until office found ; and he may convey lands.

When an alien dies, his lands vest at once by escheat in the State.

When a citizen dies intestate, and without heirs, his real estate vests immediately and without office found, in the State.

A State may by law make aliens capable of taking lands by descent, within its own territory.

The subscribing witnesses to a deed, which was lost, resided out of the State.

The supposed maker of the deed testified that a copy, which was produced, was a true copy of a deed made by the witness. It was *held*, that this evidence was competent to be submitted to a jury as proof of the execution of the deed.

Where the subscribing witnesses to a deed resided in another State, the depositions of witnesses residing in such other State, proving the signatures of the maker of the deed and of the subscribing witnesses, were *held* to be proof of the deed—the subscribing witnesses having been absent from the country when the depositions were taken.

Where a deed of land was made in the name of the principal, but executed by an attorney, as follows : “ In testimony of the foregoing, I. W., being duly constituted attorney for the purpose, has hereunto set his hand and seal, I. W. and seal,” it was *held*, that the instrument was sufficient to pass the estate of the principal.

A witness testified that the signatures to a certain deed, a true copy of which he annexed to his deposition, were those of the maker of the deed and the subscribing witnesses, of whom he was one ; and that he saw the deed executed. A deed, of which the copy annexed to the deposition was an exact copy, was produced. It was *held*, that the deposition was competent evidence to be submitted to a jury to prove the execution of the instrument produced.

THIS was a petition for partition of land in Haverhill, the petitioner alleging that she was seized of three undivided fourth parts. Issue was joined upon the seizin of the petitioner and the cause tried at the September sittings in this county, 1834.

It appeared that John Montgomery, being seized of the premises, on the 29th June, 1811, conveyed the same to Nicholas Dorion, in fee and in mortgage; and afterwards, on the 16th October, 1822, released to the said Nicholas all his right to redeem; and the said Nicholas then took possession, which he retained until his death in 1826.

Nicholas Dorion had living at the time of his death the following relations, viz.: John B. Dorion and Joseph Dorion, his brothers; Maria A. Gowvin, his sister; and Peter Dorion, M. A. Cary, F. Dorion, Julia Dorion, Joseph Dorion, M. A. G. Ibertson, and M. A. Gilroy, children of his brother, Peter Dorion, deceased.

All these relations of the said Nicholas were aliens at the time of his decease.

The Legislature of this State, by an Act passed on the 22d June, 1827, authorized and empowered the above-named relations of the said Nicholas Dorion, deceased, to hold and to convey the premises mentioned in this petition, as fully and effectually, and in the same proportions, as if they were citizens of the United States; and declared that the State did not and would not claim the premises.

The petitioner offered in evidence a copy of a power of attorney, purporting to be signed by M. A. G. Ibertson and her husband, and to authorize Isaac Winslow, Jr., to make sale and dispose of her interest in the said premises, and make deeds of the same. There were subscribing witnesses to the power, which was dated July 31, 1828, and the copy was attested by the register of deeds in this county. The subscribing witnesses did not reside in this State, and it was satisfactorily proved that the original power was lost. The said M. A. G. Ibertson testified that the said copy attested as aforesaid, was a true copy of a power executed by her and her husband on the 31st July, 1828.

The petitioner gave in evidence a power of attorney purporting to be executed by M. A. Gilroy, and dated November 3, 1827. The subscribing witnesses were W. Pickering and I. S. Winslow. Isaac Winslow, in his deposition taken March 28, 1831, testified that he knew the said subscribing witnesses; that they were absent from the country, on foreign voyages, and would not return to Boston, where they resided when at home, until the middle of the next summer; that he knew their handwriting, and that their names on the power were in their handwriting.

The petitioner offered in evidence a deed dated November 20, 1828, which purported to be a conveyance of the premises to the petitioner, by Joseph Dorion and others; but it was executed as follows:—

“In testimony of the foregoing, I. Winslow, Jr., being duly constituted attorney for the purpose by all the foregoing grantors, has hereunto set his hand and seal.

“ISAAC WINSLOW, JR.,” and seal.

The petitioner further offered in evidence a deed dated 16th April, 1829, which purported to be a conveyance of the premises by Joseph Dorion and others, to the petitioner, and to be executed by Isaac Winslow, Jr., as their attorney. Isaac Winslow in his deposition testified that the signatures to a certain deed, a true copy of which was annexed to the deposition, were those of Isaac Winslow, Jr. and the subscribing witnesses, of whom he was one, and that he saw the deed signed and delivered. An original deed was produced, of which the copy annexed to the deposition was a true copy.

The respondent, John B. Dorion, became a naturalized citizen of the United States in November, 1828.

Nicholas Dorion was at the time of his decease a naturalized citizen of the United States.

A verdict was taken for the petitioner, subject to the opinion of the court upon the foregoing case.

Bell, for the respondent. We say, that nothing descended to the brothers and sisters of Nicholas Dorion at his death. An alien cannot take property in real estate by an act in law. *Cruise on Real Estate*, Title 5, ch. 1, sec. 27.

The right to inherit depends on the existing state of allegiance at the time of the descent cast. 2 *Kent's Com.* 50.

The State took nothing at the decease of Nicholas Dorion, and could not without office found. A person duly naturalized becomes entitled to all the privileges and immunities of a natural born subject. 2 *Kent's Com.* 57. Nicholas Dorion having after his naturalization inheritable blood, nothing could pass to the State till office found, as it would in case he had been an alien at his death. The relations of Nicholas Dorion, then, took nothing of his real estate at his death.

The resolve of the Legislature in June, 1827, authorizes the relations of Nicholas Dorion to take, hold, and convey the real estate of which

he died seized. But whatever may be said of the power of the Legislature on this subject to give the right to hold real estate at all—it is very clear that it cannot be given retrospectively. The Legislature cannot say in June, 1827, that the party applying shall have had the qualification in June, 1826. If the qualification can be given at all, it can only be given for the future.

The Legislature, then, gave no qualification to the parties to take, hold, and convey in this case.

But the Legislature is expressly deprived of the right to confer this power at all by the Constitution of the United States, which declares that "the Congress shall have power to establish an uniform rule of naturalization." Congress has established such a rule, and no State can change it in any respect.

But the resolve of the Legislature goes farther, and declares that this State does not and will not claim said estate as escheat by reason of the alienage of the heirs of Nicholas Dorion. This is all very well, and may perhaps bar the State from making claim; but it transfers no right or title to the heirs of Nicholas Dorion, for the plain reason that the State at the time had no right, and if it had, none is attempted to be conveyed by these words. The State had none. For although Nicholas Dorion died intestate, he had inheritable blood, being naturalized. The State could have no title then until an inquest of office had established the fact that no one was capable of taking the estate. This has never been done, and the State consequently never had any title.

The petitioner then derives no title from the State.

But the respondent was duly naturalized according to the Acts of Congress, in November, 1828.

This we say gives him the whole real estate of Nicholas Dorion, his brother. If a citizen die and his next of kin be an alien who cannot take, the inheritance descends to the next of kin, who is competent to take in like manner as if such alien had never existed. 2 Kent's Com. 49; Coke Litt. 8, a; 4 Wheaton, 453; 7 John. 214.

A person duly naturalized becomes entitled to all the privileges and immunities of natural born subjects. 2 Kent's Com. 57.

Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of the former title. 1 John. Cases, 401; 2 Bl. Com. 250.

If an alien be made a denizen by the king's letters patent, and then

purchases lands, his son, born before denization, shall not inherit these lands; but a son born afterwards may, though his elder brother be living. Yet, if he had been naturalized by Act of Parliament, such eldest son might then have inherited. For that cancels all defects, and is allowed to have a retrospective effect and energy, which simple denization has not. 2 Bl. Com. 249, 250.

The property in question, there being no heir qualified to take by descent in June, 1826, was in abeyance until John B. Dorion was naturalized, in 1828. He then became qualified, and by the retrospective effect of naturalization took the whole estate, as the next of kin to Nicholas Dorion.

This is like the case of a posthumous child, in which case it is well settled, that if the estate hath descended by the death of the owner to a brother, or nephew, the estate shall be devested and taken away by the birth of the posthumous child. 2 Bl. Com. 208. There are many other cases of a like character.

The respondent, then, by his naturalization in 1828 became seized as heir-at-law of the whole estate in fee.

On this state of his title he becomes entitled to require of the petitioner to show her title of record in due form.

The deed of November 20, 1828, which has been offered by the petitioner, is signed by the attorney only, is sealed with his own seal, and is clearly insufficient to pass a title.

The deed of April 16, 1829, was made long after the respondent's title had become perfect.

The power of attorney from M. A. Gilroy was not properly proved.

Nelson, for the petitioner.

RICHARDSON, C. J., delivered the opinion of the court.

It is contended in this case on behalf of the respondent that the heirs of Nicholas Dorion, being aliens, took nothing in the land at the time of his decease—that nothing vested in the State for want of office found, and so nothing could be granted by the State—that Congress has the exclusive power to give to aliens the rights of citizens, and therefore the Legislature of a State has no power to give to aliens the capacity to hold lands—and that when John B. Dorion was naturalized, the whole estate vested in him.

It is very certain that an alien cannot take real estate by descent. 6 Johnson's C. R. 360, *Mooers v. White*; 4 D. & E. 300, *Doe v. Jones*; 2 B. & C. 779, *Doe v. Acklam*; 7 Wheaton, 535; 5 B. & C. 771, *Doe v. Mulcaster*; 1 Cowen, 89, *Sulliff v. Forgey*; 4 Cranch, 321, *Dawson's lessee v. Godfrey*.

But an alien can take by purchase, and hold until office found. He can also convey. Com. Digest, "Alien," c. 4; Shep. Touch. 232; 6 John. C. R. 366; 12 Mass. R. 143, *Fox v. Southack*; 7 Cranch, 620; 1 Mass. R. 256, *Sheafe v. O'Neil*; 7 Cranch, 603, *Fairfax's devisee v. Hunter's lessee*.

In England, when a subject seized of lands dies without heirs, the lands revert to the original grantor, or lord of the fee. But although all lands are there holden mediately or immediately of the crown, yet as the king is not in all cases the immediate lord of the fee to whom the land of one who dies without heirs reverts, it is not quite clear, that when a subject dies without heirs his lands vest immediately in the crown without office found. But when it appears of record that the person so dying is the king's tenant, the lands vest immediately in the crown without office. 12 East, 96, *Doe v. Redfern*; 4 Coke, 54, The Warden and Company of Sadler's Case; 2 Bl. Com. 244; Plowden, 229 and 481; Wright's Tenures, 58; Co. Litt. 1; Comyn's Digest, "Escheat," A 1.

If an alien purchase lands and die, the lands instantly vest by escheat in the State without any inquest of office. Co. Litt. 2, b; 6 Johnson's C. R. 366.

But while the alien lives, the lands cannot vest in the State without office found. 5 Coke, 52, Page's Case; 1 Johnson's Cases, 399, *Jackson v. Beach*.

In this State, the lands of which a citizen dies seized without heirs revert in all cases to the State, provided he dies intestate.

Upon principle, it would seem that lands must in such a case vest immediately in the State, without any inquest of office—as they do in England in the crown, when the king's tenant dies without heirs. If no person appears to claim as heir, there is nobody to be made a party to the inquest; and nobody who is not a party, is bound. 4 Mason, 268, *Stokes v. Dawes*.

There may be cases in which an inquest of office might be expedient—as where some person is found in possession, claiming as heir or other-

wise; but we are of opinion that an inquest of office is in no such case essential to vest the title in the State.

It is very clear that Congress has the right to establish an uniform mode of naturalization. And, Congress having exercised the power, no alien can become a citizen in any other way than in the mode prescribed by Congress. The reason why this power was given to Congress is very obvious. The Constitution provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. If, then, it had been left to the several States to naturalize aliens at their pleasure, any State in the Union might at its pleasure give to aliens all the privileges of citizens in all the other States.

But when a State makes aliens capable of taking lands by descent, within its own territory, this by no means makes them citizens; nor does it give them any capacity to take lands by descent, or any other capacity whatever in any other State. Each State has the undoubted right to regulate the law of descent within its own limits.

The Legislature of New York has made aliens capable of taking land by descent in that State. 1 Cowen, 89, *Sutliff v. Forgey*. And it has been held, both in New York and in Massachusetts, that a grant of land by the Legislature to an alien and his heirs, enables the heirs, although aliens, to inherit. 5 Cowen, 314, *Jackson v. Ets*; 3 Pickering, 224, *Commonwealth v. The Heirs of Andre & Billon*.

We are of opinion that the Act of June 22, 1827, made the heirs of Nicholas Dorion capable of taking the land by descent, and that the land vested in those heirs immediately upon the passing of the Act.

The question then is, whether the petitioner has shown, by competent evidence, the title of those heirs under whom she claims, vested in herself.

Had Isaac Winslow, Junior, authority to convey the interest of Iberson and wife?

The respondent in this case sets up no title under Iberson and wife. The power of attorney was shown to have been lost, and the subscribing witnesses were not inhabitants of this State. A paper purporting to be a power of attorney from Iberson and wife to Isaac Winslow, Jr., was recorded in the registry of deeds in this county; but as it was never duly acknowledged, it has been decided in this case a copy from the registry cannot be used as evidence. 6 N. H. R. 250.

Under these circumstances, what proof of the execution and contents of the power of attorney ought this petitioner to be required to produce?

The subscribing witnesses, not living in the State, she ought not to be compelled to produce them. There is another good reason why she should not be compelled to produce them. They very probably put their names to the instrument as witnesses without knowing its contents; and if called, as the instrument is lost, are not very likely to be able to swear that a power of attorney was executed. And very probably at this distance of time they may have lost all recollection of the transaction.

When an instrument has been lost, the declarations of him who executed it have been admitted as evidence. 3 Pick. 284, *Davis v. Spooner*; 5 D. & E. 366, *Bowles v. Langworthy*; 2 John. 451; 3 Id. 477; 1 Green, 62, note; 5 Espin. N. P. C. 16, note.

If so, the testimony of the person who executed the instrument, when a credible witness, must be still better evidence. And we are of opinion that the testimony of M. A. G. Ibertson was competent to prove the power of attorney duly executed.

Was the evidence introduced competent to prove the execution of the power, which purported to be signed by M. A. Gilroy?

The subscribing witnesses are proved to have been residents in Boston in 1831, and it does not appear that they have ever been in this State. Proof of their hand writing was then competent evidence in this case. 1 Greenleaf, 62, note; 5 Espin. N. P. 16, note; 1 Starkie, 337.

Is the deed of the 20th November, 1828, so executed as to pass the estate?

When an attorney or agent makes a deed of land, to make it pass the estate of the principal, it must be made in the name of the principal. 4 N. H. R. 102.

In this case, the deed is in the name of the principals, so that the only objection to it is, that it is not so executed as to make it the deed of the principals.

There is no particular form of words required to be used, provided the act be done in the name of the principal. 2 Starkie's Ev. 477.

Where a deed was executed thus, "For James Brown, M. Wilkes and seal," it was held to be well executed. 2 East, 142, *Wilkes v. Back*.

It is not material that there should be more than one seal. 4 D. & E. 313, *Ball v. Dunsterville*.

It is immaterial whether the names of the grantors are put at the bottom or the top of the writing, if in the whole instrument the grant purports to be their grant. 3 Merrivale, 52, *Ogilvie v. Foljambe*; 2 Starkie's Ev. 605.

In this case, in testimony that the grantors who are named as such in the deed make the conveyance, the agent puts his hand and seal to the instrument. This seems to be tantamount to putting his hand and seal to the deed for them, which is sufficient.

We are of opinion that the deed is sufficient to pass the estate.

Was the evidence sufficient to prove the deed of April 16, 1829?

The witness testifies that the signatures to a certain deed, a copy of which he annexes to his deposition, are those of the grantor and the subscribing witnesses, of whom he was one. An original deed, of which the copy annexed to the deposition is an exact copy, is produced. It is not disputed that the instrument produced is an original deed. And we are of opinion that the circumstance that the copy is an exact copy of the deed, renders it sufficiently certain that the deposition relates to the deed produced. We, therefore, think that the deposition was competent testimony to be submitted to the jury to prove the execution of the instrument produced.

And we are, on the whole, of opinion that there must be judgment in favor of the petitioner.

"Escheat, *escheata*," says Lord COKE, "is a word of art and derived from the French word escheat (*id est*) *cadere, excidere* or *accidere*, and signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated," Co. Lit. 13a. Title by escheat is classified both by COKE, 1 Inst. 215, and BLACKSTONE, Com. Lib. 2, p. 244, under the head of purchase. Reeves, on the other hand, treats the subject in connection with descent, and apparently regards the lord as to taking as *ultimus hæres*, Hist. Com. Law, Vol. I. p. 374 (ed. Murphy, Phila. 1880), and BLACKSTONE says, after alluding to COKE's position, "yet on the other hand the lord is more frequently considered as being *ultimus hæres* and therefore taking by descent in a kind of caducary succession." HALE classifies escheat as a means of acquisition by act in law. Analysis of the Law, sect. XXXIII. HARGREAVES, learnedly considering the nature and incidents of escheat, says: "An escheat in appearance parti-

cipates of the nature both of a *purchase* and a *descent*; of the former because some act by the lord is requisite to perfect his title and the actual possession cannot be gained till he enters or brings his suit of escheat, of the latter, because it follows the nature of the seignory and is inheritable by the same persons. But strictly speaking an escheat is a title neither by purchase nor descent. It should be considered that though the lord must do some act to put himself into the *actual possession*, yet his *title* to take possession commences immediately on the want of a tenant and this title is vested in him without waiting for his own deed or agreement, and as much by *mere act of law* as the title of an heir is in case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand escheat is not a title by *descent*, for the lord takes in his capacity as *lord* of the seignory of which the land escheated was holden and not as heir, or by right of blood. Nor is it any objection to this way of considering the title by escheat that the land escheated will be inheritable in the lord as land by purchase, where he has the seignory by purchase, and as land by descent, where he has the seignory by descent; for the reason of that is, not that the escheat is either a purchase or descent but because the escheat follows the seignory from which the right to it is derived as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles of land under *purchase* and *descent*, it would be more accurate to say that the title to land is either by purchase, to which the act or agreement of the party is essential or by *mere act of law*, and under the latter to consider first *descents* and then escheats and such other titles not being by descent as yet like them accrue by *mere act of law*," Harg. note (2), Co. Lit. 18 b. CHITTY, in his note to 2 Bl. Com. 201, apparently agrees with the position taken by HARGREAVES, and his division of estates seems more logical and exact than the old one.

Escheat Dependent upon Feudal Principles.

Escheat under the English law rested entirely upon feudal principles and was a fruit of tenure, 2 Bl. Com. 244; Wright on Tenures, 115-117; and was founded on the want of a tenant to perform the services required by his tenure; this well appears by the language of Sir MATHEW HALE, then Lord Chief Baron, in the case of *The Attorney-General v. Sands*, Hardr. 488; S. C., 2 Freem. 129: "There is here no question concerning the forfeiture of the fee simple in trust; for that must arise by escheat, and *there can be no escheat but pro defectio tenantis*, but here is a tenant *in esse*;" and later in the same case: "The trust of the inheritance is not forfeitable in this case, because if it were, the king must be in by escheat; which cannot be

but for want of a tenant, and here the feoffee is tenant ;" and it is remarked by Sir THOMAS CLARKE, M. R., in *Burgess v. Wheate*, 1 Eden, 200; S. C., 1 Wm. Blackst. 124, that the expression to be found in some books implying an escheat "for want of *heirs*" "is owing to this, that before the power of alienation, want of tenant and want of heir were the same thing, for on the death of the ancestor none but the heir could be tenant."

Use of word Escheat in this Country.

This being the case, as in this country feudal tenures have not existed, except formerly in Maryland, it is apparent that escheat in its strict, feudal sense cannot here exist, or, with the exception indicated, have existed ; the word, however, is used amongst us to express that right which exists in the State, as sovereign, to the ownership and possession of property which is left without any other legal owner ; this right of the State we find is not peculiar to the common law, but is expressly recognized by the civil law in the Code of Justinian. "Bona vacantia mortuorum tunc ad fiscum jubemus transferri si nullum ex qualibet sanguinis linea vel juris titulo legitimum relinquerit intestatus," and, accordingly, in all of the United States we find provisions for the enforcement of this right, under the name of escheat, although with us it is entirely disconnected from any feudal tenure ; the name, however, as in many respects our escheat resembles that of the old common law, need not be quarrelled with, and indeed many of the rules governing an escheat in England are applicable to escheat in the United States.

Escheat of Two Kinds.]

Escheat in England was of two kinds—*propter defectum sanguinis* and *propter delictum tenentis*, 2 Blackst. Com. 246.

Escheat Propter Defectum.

According to Lord COKE, "Aptly is a man said to be attainted, *attinctus*, for that by his attainder of treason or felony his blood is so stained and corrupted as, first, his children cannot be heirs to him nor to any other ancestor."

Escheat *propter defectum* may be said, generally, not to exist amongst us, for the doctrine of corruption of blood is practically extinct. By the Constitution of the United States attainder of treason cannot work corruption of the blood or forfeiture, except during the life of the person

attainted, Art. 3, § 3, cl. 2; by Art. 1, § 9, cl. 3, Congress is prohibited from passing any bill of attainder; and by Art. 1, § 10, cl. 1, the right to pass such a bill was surrendered by the States.

From the connection in which the first quoted clause occurs its reference can be only to attainder for treason against the United States, leaving the States free to enforce an attainder by other means than by bill, but the hardship of the old common law has been so felt in the United States that, in many of the States, forfeiture of estate on conviction of crime has been abolished or prohibited by Constitutional provision or statute, see Alabama, Const. Art. 1, § 20; Arkansas, Const. Art. 2, § 17; Connecticut, Art. 9, § 4; Colorado, Art. 2, § 9; Delaware, Const. Art. 1, § 15; Georgia, Const. Art. 1, § 2, cl. 3; Code (1882), § 2675; Illinois, Const. Art. 2, § 11; Indiana, Const. Art. 1, § 30; Kansas, Bill of Rights, § 12; Kentucky, Const. Art. 13, § 22; Louisiana, Rev. Laws (Voorhis, 1884), § 978; Maine, Const. Art. 1, § 11; Maryland, Declaration of Rights, § 27; Rev. Code (1878), Art. 73, § 24; Minnesota, Const. Art. 1, § 11; Missouri, Const. Art. 2, § 13; Nebraska, Const. Art. 1, § 15; New Jersey, Criminal Procedure, Rev. (1877), p. 289, pl. 114; North Carolina, Const. Art. 4, § 5; Ohio, Const. Art. 1, § 12; Oregon, Const. Art. 1, § 26, Crim. Code, § 763; Pennsylvania, Const. Art. 1, § 19; South Carolina, Const. Art. 1, § 21; R. S. § 2314; Tennessee, Const. Art. 1, § 12; Texas, Const. Art. 1, § 21; Virginia, Act 1878, Ch. 311, § 10, cl. 5; West Virginia, Const. Art. 3, § 18; R. S. Ch. 48, § 4; Wisconsin, Const. Ch. 1, § 12; and it is thought, as our criminal law is statutory, that unless a forfeiture or liability to be deprived of property by escheat be attached by statute to the commission of a crime, there can be no escheat in any State and certainly not where the doctrine of corruption of blood does not prevail. A modified escheat upon attaint is, however, apparently admitted in Pennsylvania, Kentucky and Delaware, *i. e.*, forfeiture for the life of the person attainted, and in New York, forfeiture for treason is still recognized, Code, Civil Pro. § 1977.

It is proper to note that although escheat is frequently, in our statutes and elsewhere, used as covering a forfeiture for crime, which use has arisen here from the fact that the recipient of the forfeited or escheated land is the same, viz., the State, and though in the few lines immediately preceding we have treated what more strictly would be a forfeiture than an escheat, yet an escheat proper ought not to be confounded with a forfeiture for crime, and, therefore, an act providing for an escheat, or regulating proceedings thereunder, will not come within the purview of the prohibition of *ex post facto* laws contained in the federal Constitution, *White v. Wayne*, 1 T. U. P. Charl. 94.

Escheat Propter Delictum Tenentis.

Escheat of the second class exists in the United States and arises from two causes: (1) for want of heirs of an intestate capable of taking the land of which he dies seized; (2) on account of the alienage of a purchaser of land or of the heirs of a decedent. To these may be added escheat where land is held by a corporation not authorized by law to hold land. In this note we shall not especially consider the escheat of lands attempted to be held by corporations.

When and in what States the lands of an alien escheat or are escheatable has already been considered in Vol. I. p. 499, *et seq.*

Escheat for want of heirs takes place where any one seized of land dies intestate without leaving heirs capable of inheriting the land, and this may be where the intestate has issue, if the issue be a monster or a bastard, though the liability to escheat in the latter case has, in most States, been removed where the intestate is a woman, see *ante*, p. 432, and in some States and under some circumstances where the intestate is a man, see *ante*, p. 437.

At common law, where a bastard child died without issue, his estate would escheat, *Doe v. Bates*, 6 Blackf. 533; *Bent v. St. Vrain*, 30 Mo. 268; but this has been altered by statute.

As a general rule it may be stated that escheat will not be permitted so long as blood relatives of the decedent can be found, with the qualification, in case the decedent died seized of ancestral estate (in States where a distinction is made between acquired and ancestral estates), that the said relatives be also of the blood of the first purchaser or ancestor, but in Maryland an estate may escheat for lack of kin within the fifth degree.

Lands given to a corporation will not escheat on the dissolution of the corporation, but will revert to the donor, Co. Litt. 13 b.

What Estates Escheat.

Escheat will apply not only to estates in possession, but also to those in remainder, if vested. In *The People v. Conklin*, 2 Hill, 67, it was argued that an escheat was confined to estates in possession, and Fitzherbert, N. B. 144 B., was cited to sustain the position; but BRONSON, J., said: "But the learned author was not there speaking so particularly of title by escheat as he was of the form of the remedy. After putting a case where the lord shall have a writ of escheat, he adds in the passage cited: 'But if a man be tenant for life, the remainder in fee unto a stranger and his heirs, and afterwards the stranger [remainder-man] dieth without heirs and

afterwards the tenant for life dieth, the lord shall not have a writ of escheat, because the tenant for life was tenant to the lord and not he in the remainder. But then the lord should have a writ of intrusion if a stranger enter on the land after the death of the tenant for life.' Whether a writ of escheat or of intrusion was the most appropriate remedy in the case put we need not inquire, for in this State the remedy is now by ejectment in all cases, 1 R. S. 282, § 1. Fitzherbert does not say that the remainder could not so escheat so long as the life estate continued, but the contrary may be inferred from his language. He says the 'lord shall have a writ of *intrusion*,' thus giving him the same remedy against the stranger who entered after the tenant for life that the remainder-man would have had, F. N. B. 203; 3 Blackst. Com. 168-9." And the learned judge further remarked, that to uphold the escheat of a remainder it was not necessary to rely on a doubtful inference, and cited Fitz. N. B. p. 58, G.; Viner, Esch. L. pl. 4, Litt. § 348; Co. Litt. 215 b.

Where, however, a statute of limitations has been passed fixing a time within which the Commonwealth must assert its right to escheated property, it seems that it will not be bound to proceed to declare the escheat of a remainder while the life estate upon which it depends is in existence, *Commonwealth v. Naile*, 88 Pa. St. 429.

An equitable as well as a legal estate is in this country subject to escheat, *Matthews v. Ward*, 10 Gill & J. 443; 4 Kent. Com. 424; *Cross v. De Valle*, 1 Wall. 5; *Atkins v. Kron*, 5 Ired. Eq. 207; 3 Washb. R. P. 446; Hill, Trust. 270; it is so declared by statute in Pennsylvania, Act of April 17, 1869, § 1 P. L. 71; Virginia, Code (1873), Ch. 109, § 25; West Virginia, Rev. St. Ch. 81, § 24; Kentucky, Gen. Laws (Bul. & Fel. 1881), Ch. 36, § 4. The rule in England, on the contrary, is that a trust does not escheat for default of a *cestui que trust*, *Burgess v. Wheate*, 1 Eden, 177. The reason for the distinction between the rules in the two countries is manifest; in England, escheat depends on tenure, the lord can only claim for want of a tenant, and while there is a trustee there is a tenant; in this country, the State takes the beneficial interest in everything that belongs to nobody else—the land falls back, as it were, into the common fund.

When Escheat takes place—Office Found.

Lands which have been purchased by an alien will not escheat until office found, see Vol. I. p. 499, but where the escheat is for want of heirs, the escheat takes place *eo instanti* the decedent dies intestate, and no inquisition of office is necessary, *Mooers v. White*, 6 Johns. Ch. 360; *Hall v. Gittings*, 2 H. & J. 112; *State ex rel. Roberts v. Reeder*, 5 Neb. 203;

Montgomery v. Dorion, 7 N. H. 475; *Rubeck v. Gardner*, 7 Watts, 455; *Haigh v. Haigh*, 9 R. I. 26; *Den ex d. Colgan v. McKeon*, 24 N. J. L. 566. This is undoubtedly the general rule, and the only logical one, for the title to land cannot be in abeyance, it must vest somewhere, and the ground of escheat is that there is no one but the State to take it, though there may be some States in which the law is otherwise. Mr. Washburne, R. P. Vol. 3, p. 445, seems to regard Virginia as one of the States in which the rule is not in force, saying: "In some States it would seem that if upon the death of the tenant without heirs the lands are left vacant they are considered as vesting at once in the State; in others such is deemed to be the case if there shall be a judgment in favor of the State, although no writ of possession shall have been executed." For the latter part of his position he cites *Commonwealth v. Hite*, 6 Leigh, 588, but an examination of that case will show that the matter before the court was the right of the Commonwealth to maintain a writ of intrusion, before having acquired possession or an inquisition of office, where the lands were not vacant; the question of the Commonwealth's title or the time at which it began did not come into question—and this case has been very fully explained, by the court from which it emanated, in *Sands v. Lynham*, 27 Gratt. 291, in which case STAPLES, J., after stating the general rule and citing cases in support of it, said: "The case of *Commonwealth v. Hite*, 6 Leigh, 588, is not in conflict with these authorities. That was an information for intrusion on land of the Commonwealth. Being in the nature of an action of trespass *quare clausum fregit* it will not be maintained except in the case of actual possession, and the chief if not the only question was whether the effect of an inquest of office was to vest the possession of escheated lands in the State. It was held by this court that when the possession of escheated lands is vacant at the time of office found the effect of that proceeding is to vest the State with possession. If the possession is not vacant, it does not become so vested and an entry or seizure by the State is essential in order to maintain an information for intrusion. This was the sole point decided by the court. It is very true that some expressions fell from Judge Tucker to the effect that the crown can only take by matter of record. All of which is strictly accurate as applied to an alien claiming by gift or by devise. He is in by title which can only be divested by some act in the nature of a judicial proceeding, because the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury. But as according to the common law land cannot be in abeyance or without an owner, even for a single minute, it follows, necessarily, that upon the death of the person last seized, without heirs capable of inheriting, the title must immediately vest in the State

without office found. The doctrine of escheat is originally derived from the old feudal law. An inquisition does not constitute an escheat. It is simply the means by which the State furnishes authentic record evidence of her title. The word escheat is derived from the French, and properly signifies the falling of the lands by accident to the lord of whom they are holden, in which case the fee is said to be escheated. It is a species of reversion by which, upon the death of the tenant without heirs, the lord becomes entitled to his estate. While at common law a writ of escheat was necessary to vest the estate in the lord, when the king became entitled, upon the death of the tenant without heirs capable of inheriting, no office was necessary; but he might enter and seize without judicial proceedings because in such cases the freehold was cast upon him by law in actual possession. In this country, the doctrine of escheat rests upon the broad principle that when the title to land fails from defect of heirs or when, from any cause, there ceases to be an individual proprietor of the land it reverts back to the community, 1 Lomax, Dig. 774, 777; 2 Greenleaf's Cruise on Real Property, 213. In such cases, the title being in the State upon the death of the owner, no inquest of office is necessary. If the possession be vacant at the death of the owner, both title and possession are at once transferred to the State. If, on the contrary, the land be held in adverse possession, the State must enter by her officers. Such an entry may perhaps be necessary to enable the State to make a valid grant of the land or to maintain an information for intrusion, but it is not essential to the title, any farther than possession is to be considered as an element of title."

In New York, in *Jackson ex d. Smith v. Adams*, 7 Wend. 367, it was held that no right of entry was in the State until after office found, and that, therefore, a grant made by the State before office found would pass no title; but this position was thought by STRONG, P. J., in *McCaughal v. Ryan*, 27 Barb. 376, to rest upon the statutes West. 1, c. 24, and 18 Hen. 6, c. 6, and the learned judge, in his opinion, said: "These statutes having been repealed in this State their requisitions are not in force here and the common law rule must prevail. It is undoubtedly competent for the State to take immediate possession of lands which otherwise would be in abeyance through the death of the last tenant in fee without heirs. The Revised Statutes relative to escheats (1 R. S. 282) recognize this right by authorizing an action of ejectment for escheated lands without any preliminary inquisition. There is no constitutional provision restraining the Legislature from making a grant of land to which the State has a valid title, although the same may not be in the actual possession of any of its officers or may be held adversely by others." This would seem to show

that the law prevailing in New York is in accord with the general rule. In California, however, the rule is declared to be that the title does not vest, even in a case of escheat for want of heirs, without office found or its equivalent, *People v. Folsom*, 5 Cal. 373. And while the law is not stated in such forcible terms yet it is evidently the same in Georgia and Iowa—for in the former State it was held that an act, passed before office found, relieving land from escheat was valid, although an act existed which declared all moneys arising from escheated lands to be vested in and to be part of the fund of the county in which the lands lay, *Gresham v. Rickenbacher*, 28 Ga. 227; and in Iowa it has been held that, notwithstanding a constitutional dedication of all escheated lands to the school fund, the Legislature might, pending proceedings to declare an escheat, pass an act releasing the right of the State in the land claimed to have escheated, *State ex rel. Attorney-General v. Tilghman*, 14 Iowa, 474; neither of these cases could be upheld did the title vest *eo instanti* the heirless intestate died, for in that case the antecedent grant would at once take effect and there would be left nothing in the State to grant or to waive, and indeed in the Iowa case LOWE, J., put the rule squarely on the ground, “Neither the title nor the proceeds of the land had as yet vested in the State.”

The use of an inquest of office or its equivalent, except in those States in which an inquest is held essential to the vesting of the land in the State, is to declare, ascertain or furnish record evidence of an escheat, but after a long lapse of time an inquest may be presumed, *Sands v. Lynham*, 27 Va. 291, and while an inquisition is a lien, yet to give it that effect it must be filed, *Ramsey's Appeal*, 2 Watts, 228; *Commonwealth v. Hite*, 6 Leigh, 588; and the facts which support an escheat must appear in it, *Ramsey's Appeal, supra*; *Catham v. State*, 2 Head, 553. By some authorities an inquisition is held necessary where the land is in adverse possession and it is sought to recover it in ejectment or other possessory action, *Reid v. State ex d. Thompson*, 74 Ind. 252; *Commonwealth v. Hite, supra*, and see *Jackson ex d. Smith v. Adams*, 7 Wend. 367; in the recent case of *Wallahan v. Ingersoll*, 22 Rep. 514, the Supreme Court of Illinois said: “When the owner of real property dies intestate without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the State. Yet when thus acquired the State cannot make its title available without first establishing it in the manner prescribed by law. This is done by the institution of a purchase proceeding in the proper court in the name of the people for the purpose of proving and establishing by judicial determination title in the State;” but by other authorities it is held that a possessory action can be brought at once and the escheat shown in the action, subject, of course, to any defence which would be good upon a

traverse to an inquisition, *University of North Carolina v. Johnston*, 1 Hayw. 376, note; *People v. Conklin*, 2 Hill, 67; *People v. The Fulton Fire Insurance Co.*, 25 Wend. 224; and see N. Y. Code Civil Proc. § 1977.

What Title must be shown to successfully oppose Escheat Proceedings, or to show Rule by Virtue of Escheat.

An inquest is traversable; in New York it is held that the traverser need only show a failure of the title of the State, *People v. Cutting*, 3 Johns. 1; and where the traverser is in actual possession this would seem to be a proper rule; in Pennsylvania, however, it is held that the position of the traverser is that of a plaintiff in ejectment and that he must show a title superior to that of the Commonwealth, which is in possession by virtue of the inquest; and it is held in Virginia that one who acts as *amicus curiae*, who has no interest in the land and who does not represent any person having an interest, cannot move to quash an inquisition, *Dunlop v. Commonwealth*, 2 Call, 284, and that one who claims against an inquest in a *monstrans de droit* must show his right in order to obtain a judgment of *amoveas manus*, *French v. Commonwealth*, 5 Leigh, 512.

It is to be borne in mind that there is a presumption of the existence of heirs and, therefore, the claimant, by virtue of an escheat, must in the absence of an office found, show something to countervail the presumption—as an inquiry duly made amongst persons most likely to have knowledge with reference to the relatives of the decedent, if the claimant rely merely on the fact that relatives have not been heard of, for the mere want of such knowledge amongst strangers would not be sufficient, *The State v. Teulon*, 41 Tex. 249; *University v. Harrison*, 90 N. C. 385, overruling as to this point, *University v. Johnston*, 1 Hayw. 373; but in *Brown v. The State*, 36 Tex. 283, where the court had been asked to charge that there was a presumption that the grantee of certain lands had children, and that they outlived their father and, consequently, that the Commonwealth was bound to prove their death, the Supreme Court held that to have given such an instruction would have imposed too great a burden upon the State, and that there was a contrary presumption that the children of the grantee would have been told of the grant by their father and would, after his death, have made claim, so that the fact that no claim had been made raised a presumption that no children existed. In Maryland, it has been held that there was no presumption that there were no heirs, *Hammond v. Inloes*, 4 Md. 138; this would leave the burden of proof to depend on the form of action.

Conveyance by State of Escheated Lands.

Lands which fall to the State by virtue of an escheat are not in the position of vacant or ungranted lands, but the State takes the rights of the last tenant, it is, therefore, held that escheated lands cannot be taken up by location as vacant lands, *Hughes v. The State*, 41 Tex. 10; or be regranted as vacant land, *Bodden v. Speigner*, 2 Brev. 321; *Straub v. Dimm*, 27 Pa. St. 36; or granted by officers appointed to convey vacant lands, *Trustees of the University v. Sawyer*, 1 Tayl. 114. Where there is a statute providing for the disposal, by sale or otherwise, of escheated lands, the provisions of the statute must be followed in order to make a good title, *Armstrong v. Bittinger*, 47 Md. 103. Where the State, pending proceedings to declare an escheat, releases to one who claims as heir, that person cannot treat such release as an escheat grant to him and, afterwards, claim title as representing the State, *State v. Engle*, 21 N. J. L. 347.

Grant before Escheat.

As the result of the immediate vesting of land by escheat, it follows that a grant made by the State of escheated land before office found is good, *Rubeck v. Gardner*, 7 Watts, 456, and so a grant of land to escheat *in futuro*, *Nettles v. Cummings*, 9 Rich. Eq. 440, hence where a grant of such lands as may escheat has been made, by even a general statute, it is beyond the power of the Legislature, after the death of an intestate without heirs to grant his lands to a grantee, other than the person or institution named in the grant made before the escheat, for immediately on the death of the intestate the estate vested in the State and *eo instanti* passed by its grant out of it and so was vested in the first grantee, this is the case even where the second grant is for an object similar to or even precisely that for which the first grant was made, *Rock Hill College v. Jones*, 47 Md. 1; *Hinkle's Lessee v. Shadden*, 2 Swan, 46; *Parchman v. Charlton*, 1 Coldw. 381. A good example of this position is found in Nebraska. By the Constitution of that State the proceeds of escheated lands are devoted to the common school fund, and their diversion therefrom is forbidden; one A. died without heirs capable of taking his land, the Legislature passed an act appropriating the land to the endowment of a school to be known as the A. Memorial School, the act was held void, *State ex rel. Roberts v. Reeder*, 5 Neb. 203.

Statutory Grantee must be party to Proceeding to Sell Lands on Death of Intestate.

Another consequence of the immediate vesting in the State on the death of the intestate is that where it is sought to sell escheated lands to pay the debts of the intestate, the statutory grantees must be made parties to the proceeding or no title will pass, *Hinkle's Lessee v. Shadden*, 2 Swan, 46.

Escheat Grant—Effect of.

An escheat grant is *prima facie* evidence of title and need not state whose lands have escheated, *Lee v. Hoye*, 1 Gill, 188; it is evidence that an escheat had taken place at its date but not that it had taken place at any time prior to the warrant, *Peterkin v. Inloes*, 4 Md. 175; and it will cover all the land held by him whose death caused the escheat, *Casey's Lessee v. Inloes*, 1 Gill, 480, except where the grantee knows he is taking less, as, in Maryland, where escheated land may be taken up by warrant and survey on the payment of a certain price, where the survey expressly excluded a part of the escheated land and the person taking out the warrant knew he was not including the whole, it has been held that his title extended only to the land which was covered by the survey, *Jones v. Badley*, 4 Md. Ch. 167.

Statutory Disposition of Escheated Land.

The disposition of escheated land is provided for in advance of actual escheat by the law of many of the States; in Michigan, Act 1883, § 169, Const. Art. 13, § 3; Wisconsin, R. S. (1878), § 2270; Iowa, R. S. (1880), § 2463, Const. Art. 9, § 2, cl. 3; Nebraska, Comp. St. (1881), Ch. 80, Art. 2, § 3, Const. Art. 8, § 3; Tennessee, Code (1884), § 2961; Arkansas, Act 1885, Ch. 18, § 3; California, Civil Code, § 6406, 6407, Const. Art. 9, § 4, it is appropriated to the benefit of the State common school fund; in Indiana, R. S. (1881), § 2478; Kansas, R. S. (1879), Art. 37, § 179, Const. Art. 6, § 3, to the school fund of the county wherein the land lies; in Vermont, to the school fund of the town wherein the land lies, R. S. (1880), § 2237; in North Carolina to the State University, Code (1883), § 1504, *University v. Johnston*, 1 Hayw. 373; *University v. Sawyer*, 2 Id. 258; *University v. Foy*, Id. 310; in Georgia, to the county treasury, Code (1882), § 2672; in Rhode Island, to the town treasury, Pub. Stat. (1882), Ch. 188, § 1; in Ohio, to the county agricultural society, or house of refuge, in cities of the first class, R. S. (1880), §§ 4185–6. The Constitutions of Virginia, Art. 8, § 7; West Virginia, Art. 12, § 4; Missouri, Art. 11, § 6; Oregon, Art. 8, § 2; Nevada, Art. 11, § 3; Colorado, Art. 9, § 5; South Carolina, Art. 10, §§ 10, 11; Alabama, Art. 12, § 3; Mississippi, Art. 8, § 6; Florida, Art. 9, § 4, and Louisiana, sect. 229, contain provisions that the proceeds of escheated lands shall be applied to public schools. In the other States the lands go generally to the State without specification of the purpose to which they are to be devoted.

Liability of Escheated Land for Debts of former Owner.

At common law, when land escheated the creditors of the late owner lost all means of recourse thereto for the purpose of the satisfaction of their debts, *O'Hanlin v. Den ex d. Van Kleeck*, 20 N. J. Law, 31; but in this country, as escheat does not rest or depend upon feudal principles, the State takes only what the intestate or alien owned, and it is thought that the debts of the intestate or alien will remain a charge upon the land and be defrayed out of its proceeds when sold. This, which is common justice, is provided for by statutes in some States, see Virginia, Code (1880), Ch. 109, § 27, *Sands v. Lynham*, 27 Gratt. 291; West Virginia, R. S. (1879), Ch. 81, § 26; Kentucky Gen. Laws (Bul. & Fel. 1881), Ch. 36, § 5; Vermont, R. S. (1880), §§ 2235, 2237; Rhode Island, Pub. St. Ch. 188, § 1; Pennsylvania, Act Sept. 29, 1787, § 2, *Crawford v. Commonwealth*, 1 Watts, 486; Delaware, R. C. (1874), Ch. 82, § 1; *Congregational Church v. Morris*, 8 Ala. 182; but in New Jersey it is held that the land cannot be sold in course of administration by an order of the Orphans' Court, and that the right of creditors must be otherwise worked out, *O'Hanlin v. Den ex d. Van Kleeck*, 20 N. J. L. 31, affirmed in *Den v. O'Hanlin*, 21 Id. 582. When claims are presented against the escheated land the State or the escheator may set up the Statute of Limitations, *Watson v. Lyle's Administrator*, 4 Leigh, 236; indeed TUCKER, P., regarded it as the duty of the State to plead the statute, since, notwithstanding the escheat and a sale, any person showing title within ten years could recover the net proceeds of the land, *Id.*

Escheat of Trust.

When an escheat takes place for want of heirs or for the alienage of a trustee, the land will remain charged with the trust, and it is presumed that in all cases the State will protect the rights of the *cestui que trust* either by the appointment of a new trustee or through its own officers.

Statutory Protection of Heir.

Nearly all of the States have provided against possible injustice to unheard of heirs by enactments fixing a time within which the land or its proceeds may be claimed by any one who shows himself heir to the deceased, and in some there appears to be no limit to the time within which the proceeds of escheated land which has been sold may be recovered, see New Hampshire, Gen. Laws (1879), Ch. 203, § 8; Rhode Island, Pub. Stat. (1882), Ch. 188, §§ 1, 9; Connecticut, R. S. (1876), Tit. 18, Ch. 2, § 2; Indiana, R. S. (1881), § 2414; Kentucky, R. S. (1881), Ch. 36, §§ 5, 6; Texas, R. S. (1879), §§ 1783, 1784; Florida, M'Clell. Dig. Ch. 99, § 4.

Inviolability of Legislative Grants.

FLETCHER v. PECK.

Supreme Court of the United States, February Term, 1810.

[Reported 6 Cranch, p. 87.]

If the breach of covenant assigned be, that the State had no authority to sell and dispose of certain land, it is not a good plea in bar, to say that the Governor was legally empowered to sell and convey the premises, although the facts, stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary, that a breach of covenant be assigned in the very words of the covenant. It is sufficient, if it show a substantial breach.

The court will not declare a law to be unconstitutional; unless the opposition between the constitution and the law be clear and plain.

The Legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

In a contest between two individuals, claiming under an Act of a Legislature, the court cannot inquire into the motives which actuated the members of that Legislature. If the Legislature might constitutionally pass such an Act; if the Act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals, founded on the allegation that the Act is a nullity, in consequence of the impure motives which influenced certain members of the Legislature which passed the law.

When a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

A party to a contract cannot pronounce its own deed invalid, although such party be a sovereign State.

A grant is a contract executed.

A statute, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain, in 1763, did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to be absolutely repugnant to seizin in fee on the part of the State.

ERROR to the Circuit Court for the District of Massachusetts, in an action of covenant, brought by Fletcher against Peck.

The first count of the declaration stated, that Peck, by his deed of bargain and sale, dated the 14th of May, 1803, in consideration of \$3000, sold and conveyed to Fletcher, 15,000 acres of land, lying in common and undivided, in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude, a due east course, to the Tombigbee River, thence up the said Tombigbee River, to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude, a due west course, to the Mississippi; thence down the said river, to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed, dated the 27th of February, 1796, and of which the said Phelps conveyed four-fifths to Benjamin Hichborn and the said Peck, by deed, dated the 8th of December, 1800; the said tract of 500,000 acres being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed, dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew McAllister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet, and Wade Hampton, by deed, dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters-patent under the great seal of the State of Georgia, and the signature of George Matthews, Esq., Governor of that State, dated the 13th of January, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew McAllister, and George Walker and their associates, and their heirs and assigns, in fee simple, under the name of the Georgia Company; which patent was issued by virtue of an Act of the Legislature of Georgia, passed the 7th of January, 1795, entitled "An Act supplementary to an Act for appropriating part of the unlocated territory of this State, for the payment of the late State troops, and for other purposes therein mentioned, and declaring the right of this State to the unappropriated territory thereof, for the protection and support of the frontiers of this State, and for other purposes." That Peck, in his deed to Fletcher, covenanted "that the State of Georgia aforesaid was, at the time of the passing of the Act of the Legislature thereof (entitled as aforesaid), legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the Legislature of the said State, at the time of passing the Act of sale afore-

said, had good right to sell and dispose of the same, in manner pointed out by the said Act. And that the Governor of the said State had lawful authority to issue his grant aforesaid, by virtue of the said Act. And further, that all the title which the said State of Georgia ever had in the afore-granted premises had been legally conveyed to the said John Peck, by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the State of Georgia, and finally vested in the said Peck, had been in no way constitutionally or legally impaired by virtue of any subsequent Act of any subsequent Legislature of the said State of Georgia." The breach assigned in the first count was, that at the time the said Act of 7th of January, 1795, was passed, "the said Legislature had no authority to sell and dispose of the tene- ments aforesaid, or of any part thereof, in the manner pointed out in the said Act.

The 2d count, after stating the covenants in the deed as stated in the first count, averred, that at Augusta, in the said State of Georgia, on the 7th day of January, 1795, the said James Gunn, Mathew McAllister and George Walker promised and assured divers members of the Legislature of the said State, then duly and legally sitting in General Assembly of the said State, that if the said members would assent to and vote for the passing of the Act of the said General Assembly, entitled as aforesaid, the same then being before the said General Assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, McAllister and Walker, and their associates, should purchase of the said State, by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence, did then and there vote for the passing the said bill into a law; by reason whereof, the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; and that the title which the said State of Georgia had in the afore-granted premises, at any time whatever, was never legally con-veyed to the said Peck, by force of the conveyances aforesaid.

The third count, after repeating all the averments and recitals contained in the second, further averred, that after the passing of the said Act, and of the execution of the patent aforesaid, the General Assembly

of the State of Georgia, being a Legislature of that State subsequent to that which passed the said Act, at a session thereof, duly and legally holden at Augusta, in the said State, did, on the 13th of February, 1796, because of the undue influence used as aforesaid, in procuring the said Act to be passed, and for other causes, pass another certain Act in the words following, that is to say, "An Act declaring null and void a certain usurped Act passed by the last Legislature of this State, at Augusta, the 7th day of January, 1795, under the pretended title of 'An Act supplementary to an Act entitled an Act for appropriating a part of the unlocated territory of the State for the payment of the late State troops, and for other purposes therein mentioned, declaring the right of this State to the unappropriated territory thereof for the protection of the frontiers, and for other purposes,' and for expunging from the public records the said usurped Act, and declaring the right of this State to all lands lying within the boundaries therein mentioned :" By which, after a long preamble, it is enacted, "That the said usurped Act passed on the 7th of January, 1795, entitled, etc., be, and the same is hereby declared, null and void, and the grant or grants, right or rights, claim or claims, issued, deduced or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also annulled, rendered void and of no effect ; and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this State, or the people thereof, but is and are to be considered, both law and grant, as they ought to be, *ipso facto*, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the State, subject only to the right of treaty of the United States to enable the State to purchase, under its pre-emption right, the Indian title to the same." The 2d section directed the enrolled law, the grant, and all deeds, contracts, etc., relative to the purchase, to be expunged from the records of the State, etc. The 3d section declared, that neither the law nor the grant, nor any other conveyance or agreement relative thereto, shall be received in evidence in any court of law or equity in the State so far as to establish a right to the territory, or any part thereof, but they may be received in evidence in private actions between individuals for the recovery of money paid upon pretended sales, etc. The 4th section provided for the repayment of money, funded stock, etc., which may have been paid into the treasury, provided it was then remaining

therein, and provided the repayment should be demanded within eight months from that time. The 5th section prohibited any application to Congress, or the general government of the United States, for the extinguishment of the Indian claim; and the 6th section provided for the promulgation of the Act. The count then assigned a breach of the covenant in the following words, viz: "And by reason of the passing of the said last-mentioned Act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void."

The 4th count, after reciting the covenants as in the first, assigned as a breach, "that at the time of passing of the Act of the 7th of January, 1795, the United States of America were seized in fee-simple of all the tenements aforesaid, and of all the soil thereof, and that, at that time, the State of Georgia was not seized in fee-simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon."

The defendant pleaded four pleas, viz: 1st plea. As to the breach assigned in the first count, he said, that on the 6th of May, 1789, at Augusta, in the State of Georgia, the people of that State, by their delegates, duly authorized and empowered to form, declare, ratify, and confirm a constitution for the government of the said State, did form, declare, ratify and conform such constitution, in the words following: [Here was inserted the whole constitution, the 16th section of which declares, that the General Assembly shall have power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to this constitution.] The plea then averred, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said State were seized, among other large parcels of land and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof, in absolute sovereignty, and in fee-simple (subject only to the extinguishment of the Indian title to part thereof); and that upon the confirmation and ratification of the said constitution, and by force thereof, the said State of Georgia became seized in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said State, and the same State continued so

seized in fee-simple, until the said tenements and soil were conveyed, by letters-patent, under the great seal of the said State, and under the signature of George Matthews, Esq., Governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further said, that on the 7th of January, 1795, at a session of the General Assembly of the said State, duly holden at Augusta, within the same, according to the provisions of the said constitution, the said General Assembly, then and there possessing all the powers vested in the Legislature of the said State, by virtue of the said constitution, passed the Act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which Act is in the words following, that is to say, "An Act supplementary," etc. [Here was recited the whole Act, which, after a long preamble, declared the jurisdictional and territorial rights, and the fee-simple to be in the State, and then enacted, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company."] The tract ordered to be sold to James Gunn and others (the Georgia Company), was described as follows: "All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile Bay, where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay, to the mouth of Lake Tensaw; thence up the said Lake Tensaw, to the Alabama River, including Curry's, and all other islands therein; thence up the said Alabama River, to the junction of the Coosa and Oakfushee Rivers; thence up the Coosa River, above the big shoals, to where it intersects the latitude of 34 degrees north of the equator; thence, a due west course, to the Mississippi River; thence, down the middle of the said river, to the latitude 32 deg. 40 min.; thence, a due east course, to the Don or Tombigbee River; thence, down the middle of the said river, to its junction with the Alabama River; thence down the middle of the said river, to Mobile Bay; thence, down the Mobile Bay, to the place of beginning. Upon payment of \$50,000, the Governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being \$200,000, payable on the first of November, 1795. The plea then averred, that all the tenements described in the first count were included in, and parcel of, the lands in the said Act to be sold to

the said Gunn, McAllister and Walker, and their associates, as in the Act is mentioned. And that by force and virtue of the said Act, and of the constitution aforesaid, of the said estate, the said Matthews, Governor of the said State, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee simple, by the said patent, under the seal of the said State, and under his signature, according to the terms, limitations, and conditions in the said Act mentioned. And all this he is ready to verify; wherefore, etc. To this plea, there was a general demurrer and joinder.

2d plea. To the second count, the defendant, "protesting that the said Gunn, McAllister and Walker did not make the promises and assurances to divers members of the Legislature of the said State of Georgia, supposed by the said Fletcher in his second count, for plea saith, that until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he, the said defendant, nor the said Prime, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, McAllister and Walker, or either of them, to any of the members of the Legislature of the said State of Georgia, as is supposed by the said Fletcher in his said second count, and this he is ready to verify," etc. To this plea also, there was a general demurrer and joinder.

3d plea to the third count was the same as the second plea, with the addition of an averment, that Greenleaf, Prince, Phelps, Hichborn, and the defendants were, until and after the purchase by Greenleaf, on the 22d of August, 1795, and ever since had been, citizens of some of the United States other than the State of Georgia. To this plea also, there was a general demurrer and joinder.

4th plea. To the fourth count, the defendant pleaded, that at the time of passing the Act of the 7th of January, 1795, the State of Georgia was seized in fee simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he put himself on the country, and the plaintiff likewise.

Upon the issue joined upon the fourth plea, the jury found the following special verdict, viz: That his late Majesty, Charles the Second, King of Great Britain, by his letters patent, under the great seal of Great Britain, bearing date the 30th day of June, in the 17th year of

his reign, did grant unto Edward, Earl of Clarendon, George, Duke of Albemarle, William, Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that province, territory or tract of ground, situate, lying and being in North America, and described as follows: extending north and eastward as far as the north end of Carahtuke River or gullet, upon a straight westerly line to Wyonoahé Creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west, in a direct line, as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west, in a direct line, as far as the South Seas (which territory was called Carolina), together with all ports, harbors, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named; that the said lords proprietors, grantees aforesaid, afterwards, by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defence.

And the jury further find, that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid; that afterwards, on the 26th day of July, in the 3d year of the reign of his late majesty, George the Second, King of Great Britain, and in the year of our Lord 1729, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the Second, and the heirs and representatives of the said grantees, in conformity to an Act of the Parliament of said kingdom of Great Britain, entitled, "An Act for establishing an agreement with seven of the lords proprietors of Carolina, for the surrender of their title and interest in that province to his majesty," for and in consideration of the sum of 22,500*l.* of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors,

by the said agent of the said king, sold and surrendered to his said majesty, King George the Second, all their right of soil, and other privileges to the said granted territory; which deed of indenture was duly executed and was enrolled in the chancery of Great Britain, and there remains in the chapel of the rolls. That afterwards, on the 9th day of December, 1729, his said majesty, George the Second, appointed Robert Johnson, Esq., to be governor of the province of South Carolina, by a commission under the great seal of the said kingdom of Great Britain; in which commission the said Governor Johnson was authorized to grant lands within the said province, but no particular limits of the said province is therein defined.

And the jury further find, that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolina, under the commission aforesaid, claiming to have jurisdiction, by force thereof, as far southward and westward as the southern and western bounds of the afore-mentioned grant of Carolina, by King Charles the Second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who, at divers times, had actual possession of the southern and western parts aforesaid. That afterwards, the right honorable Lord Viscount Percival, the honorable Edward Digby, the honorable George Carpenter, James Oglethorpe, Esq., with others, petitioned the lords of the committee of his said majesty's privy council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that province, to procure there a livelihood by their industry, and to be incorporated for that purpose; that the lords of the said privy council referred the said petition to the board of trade, so called, in Great Britain, who, on the 17th day of December, in the year of our Lord 1730, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of "The Corporation for the purpose of establishing Charitable Colonies in America, with perpetual succession." And the said report further recommended, that his said majesty be pleased "to grant to the said petitioners and their successors for ever, all that tract of land in his province of South Carolina, lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest branches of the Savannah, and the

most southerly branch of the Alatamaha." And that they should be separated from the province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the 22d day of December, 1731, the said board of trade reported further to the said lords of the privy council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the Second, to the late lords proprietors of Carolina, whereby that province was to extend westward in a direct line as far as the South Seas. That afterwards, on the 9th day of June, in the year of our Lord 1732, his said majesty, George the Second, by his letters-patent, or royal charter, under the great seal of the said kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of "The trustees for establishing the colony of Georgia, in America, with perpetual succession;" and did, by the same letters-patent, give and grant in free and common socage, and not *in capite*, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina, in America, which lies from a northern stream of a river there commonly called the Savannah, all along the sea-coast to the southward, unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers, respectively, in direct lines, to the South Seas, and all the lands lying within said boundaries, with the islands in the sea, lying opposite to the eastern coast of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminentences within the said territories. That afterwards, in the same year, the right honorable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the colony of Georgia, in America, for valuable consideration therein mentioned, did give, grant, bargain and sell unto the said trustees for establishing the colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole

into eight equal parts to be divided) of, in and to the aforesaid territory, seven undivided eighth parts of which had been before granted by his said majesty to said trustees.

And the jury further find, that one-eighth part of the said territory, granted to the said lords proprietors, and called Carolina as aforesaid, which eighth part belonged to Sir George Carteret, and was not surrendered as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret, in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq., one of the said corporation, for and in the name of, and as agent to, the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, made a treaty with some of the native Indians within said territory, in which, for and in behalf of said corporation, he made purchases of said Indians of their native rights to parts of said territory, and erected forts in several places to keep up marks of possession. That afterwards, on the 6th day of September, in the year last mentioned, on the application of said corporation to the said board of trade, they, the said board of trade, in the name of his said majesty, sent instructions to said Robert Johnson, then Governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settlement of the said colony of Georgia, by giving aid and assistance to any settlers therein: and further requiring him to cause to be registered the aforesaid charter of the colony of Georgia, within the said province of South Carolina, and the same to be entered of record by the proper officer of the said province of South Carolina.

And the jury further find, that the Governor of South Carolina, after the granting the said charter of the colony of Georgia, did exercise jurisdiction south of the southern limits of said colony of Georgia, claiming the same to be within the limits of his government; and particularly, that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of our Lord 1752, by deed of indenture, made between his said majesty, George the Second, of the one part, and the said trustees for establishing the colony in America, of the other part, they the said

trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender and yield up to his said majesty, George the Second, his heirs and successors, the said letters-patent and their charter of corporation, and all right, title and authority to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, pre-eminentes and privileges, therein or thereby granted or conveyed to them; and did also grant and convey to his said majesty, George the Second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one-eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven eighth parts thereof, granted as aforesaid by his said majesty's letters-patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminentes, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises; and which grant and surrender aforesaid was then accepted by his said majesty, for himself and his successors; and said indenture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation, by affixing the common seal of said corporation thereunto, and on the part of his said majesty, by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the 6th day of August, 1754, his said majesty, George the Second, by his royal commission of that date, under the great seal of Great Britain, constituted and appointed John Reynolds, Esq., to be captain-general and commander-in-chief in and over said colony of Georgia, in America, with the following boundaries, viz: lying from the most northerly stream of a river there commonly called Savannah, all along the sea-coast to the southward unto the most southern stream of a certain other great water or river called the Alatamaha, and westward from the heads of the said rivers, respectively, in straight lines, to the South Seas, and all the space, circuit and precinct of land lying within the said boundaries, with the islands in the sea lying opposite to the eastern coast of said lands, within twenty leagues of the same. That afterwards, on the 10th day of February, in the year of our Lord 1763, a definite treaty of peace was concluded at Paris, between his Catholic majesty, the King of Spain, and his majesty, George the Third, King of Great Britain; by the 20th article

of which treaty, his said Catholic majesty did cede and guaranty in full right to his Britannic majesty, Florida, with Fort St. Augustine, and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the southeast of the river Mississippi, and in general, all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the Catholic king and the crown of Spain had till then over the said countries, lands, places and their inhabitants; so that the Catholic king did cede and make over the whole to the said king and the said crown of Great Britain, and that in the most ample manner and form.

That afterwards, on the 7th day of October, in the year of our Lord 1763, his said majesty, George the Third, King of Great Britain, by and with the advice of his privy council, did issue his royal proclamation, therein publishing and declaring, that he, the said King of Great Britain, had, with the advice of his said privy council, granted his letters-patent, under the great seal of Great Britain, to erect within the countries and islands ceded and confirmed to him by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Georgia; in which proclamation, the said government of West Florida is described as follows, viz: Bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast, from the river Apalachicola to Lake Pontchartrain, to the westward, by the said lake, the Lake Mau- repas, and the river Mississippi; to the northward, by a line drawn due east from that part of the river Mississippi which lies in thirty-one degrees of north latitude, to the river Apalachicola or Catahouchee; and to the eastward, by the said river. And in the same proclamation, the said government of East Florida is described as follows, viz: bounded to the westward, by the Gulf of Mexico and the Apalachicola River; to the northward, by a line drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's River, and by the course of the said river to the Atlantic Ocean; and to the east and south, by the Atlantic Ocean and the Gulf of Florida, including all islands within six leagues of the sea-coast. And in and by the same proclamation, all lands lying between the rivers Alatamaha and St. Mary's were declared to be annexed to the said province of Georgia; and that in and by the same proclamation, it was

further declared by the said king as follows, viz: "That it is our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

And the jury find, that the land described in the plaintiff's declaration did lie to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid. That afterwards, on the 21st day of November, in the year of our Lord 1763, and in the 4th year of the reign of said King George the Third, he the said king, by his royal commission, under the great seal of Great Britain, did constitute and appoint George Johnstone, Esq., captain-general and governor-in-chief over the said province of West Florida, in America; in which commission, the said province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the 20th day of January, in the year of our Lord 1764, the said King of Great Britain, by his commission, under the great seal of Great Britain, did constitute and appoint James Wright, Esq., to be the captain-general and governor-in-chief in and over the colony of Georgia, by the following bounds, viz: bounded on the north by the most northern stream of a river there commonly called Savannah, as far as the heads of the said river; and from thence westward, as far as our territories extend; on the east by the sea-coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof); and from thence westward, as far as our territories extend, by the north boundary line of our provinces of East and West Florida.

That afterwards, from the year 1775, to the year 1783, an open war existed between the colonies of New Hampshire, Massachusetts Bay,

Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and his said majesty, George the Third, King of Great Britain, on the other part. And on the 3d day of September, in the year of our Lord 1783, a definitive treaty of peace was signed and concluded at Paris, by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers; by the first article of which treaty, the said King George the Third, by the name of his Britannic majesty, acknowledged the aforesaid United States to be free, sovereign and independent States; that he treated with them as such, and for himself, his heirs and successors, relinquished all claim to the government, propriety and territorial rights of the same, and every part thereof; and by the 2d article of said treaty, the western boundary of the United States is a line drawn along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouchee; thence along the middle thereof, to its junction with the Flint River; thence straight to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic Ocean.

And the jury further find, that in the year of our Lord 1782, the Congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid, that they should claim in this negotiation, respecting the boundaries of the United States, that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground, that that was the southern boundary of the colony of Georgia; and that the river Mississippi should be agreed to be the western boundary of the United States, on the ground, that the colony of Georgia and other colonies, now States of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that on those grounds, the said southern and western boundaries of the United States were

agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the Legislature of the State of Georgia passed an Act, declaring her right, and proclaiming her title to all the lands lying within her boundaries to the river Mississippi. And in the year of our Lord, 1785, the Legislature of the said State of Georgia established a county, by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory; that thereupon, a dispute arose between the State of South Carolina and the State of Georgia, concerning their respective boundaries, the said States separately claiming the same territory; and the said State of South Carolina, on the first day of June, in the year of our Lord 1785, petitioned the Congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the State of Georgia, agreeable to the ninth article of the then confederation and perpetual union between the United States of America; that the said Congress of the United States did thereupon on the same day resolve, that the second Monday in May then next following should be assigned for the appearance of the said States of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said State of Georgia, by serving the Legislature of said State with an attested copy of said petition of the State of South Carolina, and said resolve of Congress. That afterwards, on the 8th day of May, in the year of our Lord 1786, by the joint consent of the agents of said States of South Carolina and Georgia, the Congress resolved that further day be given for the said hearing, and assigned the 15th day of the same month for that purpose. That afterwards, on the 18th day of May aforesaid, the said Congress resolved, that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the States of Carolina and Georgia attended in pursuance of the order of Congress aforesaid, and produced their credentials, which were read in Congress, and there recorded, together with the Acts of their respective Legislatures; which Acts and credentials authorized the said agents to settle and compromise all the differences and disputes aforesaid, as well as to appear and represent the said States, respectively, before any tribunal that might be created by Congress for that purpose, agreeably

to the said ninth article of the confederation. And in conformity to the powers aforesaid, the said commissioners of both the said States of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of our Lord 1787, met at Beaufort, in the State of South Carolina, and then and there entered into, signed, and concluded a convention between the States of South Carolina and Georgia aforesaid. By the first article of which convention, it was mutually agreed between the said States, that the most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers then called Tugaloo and Keowee; and from thence the most northern branch or stream of said river Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo, to Georgia; but if the head spring or source of any branch or stream of the said river Tugaloo does not extend to the northern boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever thereafter form the separation, limit, and boundary between the States of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said States of South Carolina and Georgia, that the said State of South Carolina should not thereafter claim any lands to the eastward, southward, southeastward, or west of the said boundary above established; and that the said State of South Carolina did relinquish and cede to said State of Georgia all the right, title and claim which the said State of South Carolina had to the government, sovereignty and jurisdiction in and over the same, and also the right and pre-emption of soil from the native Indians, and all the estate, property and claim which the said State of South Carolina had in or to the said lands.

And the jury further find, that the land described in the plaintiff's declaration is situate southwest of the boundary line last aforesaid; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the Second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in 1763, as aforesaid; and within the bounds of the United States, as

agreed and settled by the treaty of peace in 1783, as aforesaid ; and north of a line drawn due east from the mouth of the said river Yazoo, where it unites with the Mississippi aforesaid. That afterwards, on the 9th day of August, in the year of our Lord 1787, the delegates of said State of South Carolina in Congress, moved, that the said convention, made as aforesaid, be ratified and confirmed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said States of South Carolina and Georgia ; which motion was by the unanimous vote of Congress committed, and the same convention was thereupon entered of record on the journals of Congress ; and on the same day, John Kean and Daniel Huger, by virtue of authority given to them by the Legislature of said State of South Carolina, did execute a deed of cession on the part of said State of South Carolina, by which they ceded and conveyed to the United States, in Congress assembled, for the benefit of all the said States, all their right and title to that territory and tract of land included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary line of the State of North Carolina ; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters ; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo River to the said mountains, and thence to run a due west course to the river Mississippi ; which deed of cession was thereupon received and entered on the journals of Congress, and accepted by them.

The jury further find, that the Congress of the United States did, on the 6th day of September, in the year of our Lord 1780, recommend to the several States in the Union, having claims to western territory, to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union. That afterwards, on the 9th day of August, in the year of our Lord 1786, the said Congress resolved, that whereas, the States of Massachusetts, New York, Connecticut and Virginia had, in consequence of the recommendation of Congress on the 6th day of September aforesaid, made cessions of their claims to western territory to the United States in Congress assembled, for the use of the United States, the said subject be again presented to the view of the States of North Carolina, South Carolina and Georgia,

who had not complied with so reasonable a proposition; and that they be once more solicited to consider with candor and liberality the expectations of their sister States, and the earnest and repeated applications made to them by Congress on this subject. That afterwards, on the 20th day of October, 1787, the Congress of the United States passed the following resolve, viz: that it be and hereby is represented to the States of North Carolina and Georgia, that the lands which have been ceded by the other States in compliance with the recommendation of this body, are now selling in large quantities for public securities; that the deeds of cession from the different States have been made, without annexing an express condition, that they should not operate till the other States, under like circumstances, made similar cessions; and that Congress have such faith in the justice and magnanimity of the States of North Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will feel those obligations which will induce similar cessions, and justify that confidence which has been placed in them. That afterwards, on the first day of February, 1788, the Legislature of said State of Georgia, then duly convened, passed an Act for ceding part of the territorial claims of said State to the United States; by which Act the State of Georgia authorized her delegates in Congress to convey to the United States the territorial claims of said State of Georgia to a certain tract of country bounded as follows, to wit: beginning at the middle of the river Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and from thence, due north, 140 miles, thence, due west, to the river Mississippi; thence down the middle of the said river to where it intersects the thirty-first degree of north latitude, and along the said degree, to the place of beginning: annexing the provisions and conditions following, to wit: That the United States in Congress assembled, shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the Federal Constitution of the United States. Secondly, that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly, that the sum of \$171,428.45, which has been expended

in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted in payment of the specie requisition of that State's quotas that have been or may be required by the United States. Fourthly, that in all cases where the State may require defence, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the articles of confederation. Fifthly, that Congress shall guaranty and secure all the remaining territorial rights of the State, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention between the said States and the State of South Carolina, entered into the 28th day of April, in the year of our Lord 1787, and the clause of an Act of the said State of Georgia, describing the boundaries thereof, passed the 17th day of February, in the year 1783, which Act of the said State of Georgia, with said conditions annexed, was by the delegates of said State in Congress presented to the said Congress, and the same was, after being read, committed to a committee of Congress; who, on the 15th day of July, in the said year 1788, made report thereon to Congress, as follows, to wit: "The committee, having fully considered the subject referred to them, are of opinion, that the cession offered by the State of Georgia cannot be accepted on the terms proposed: First, because it appears highly probable that on running the boundary line between that State and the adjoining State or States, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded, and that lately ceded by South Carolina, will be retained by the said State of Georgia; and therefore, the land which the State now offers to cede must be too far removed from the other lands hitherto ceded to the Union to be of any immediate advantages to it. Secondly, because there appears to be due from the State of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or condition before recited; and it is improper in this case to allow a charge against the specie requisitions of Congress which may hereafter be made, especially, as the said State stands charged to the United States for very considerable sums of money loaned. And thirdly, because the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by Congress to any State, and which, considering the spirit and meaning of the confederation, must be unnecessary and improper. But the committee are

of opinion, that the first, second and fourth provisions, before recited, and also the third, with some variations, may be admitted ; and that, should the said State extend the bounds of her cession, and vary the terms thereof as hereinafter mentioned, Congress may accept the same. Whereupon, they submit the following resolutions : That the cession of claims to western territory, offered by the State of Georgia, cannot be accepted on the terms contained in her Act passed the first of February last. That in case the said State shall authorize her delegates in Congress to make a cession of all her territorial claims to lands west of the river Apalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said Act, and shall so far vary the proviso respecting the sum of \$171,428.45, expended in quieting and resisting the Indians, as that the said State shall have credit in the specie requisitions of Congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, Congress will accept the cession." Which report being read, Congress resolved, that Congress agree to the said report.

The jury further find, that in the year of our Lord 1793, Thomas Jefferson, Esq., then Secretary of State for the United States, made a report to the then President of the United States, which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were then in dispute between the King of Spain and the government of the United States ; one of which points in dispute was, the just boundaries between West Florida and the southern line of the United States. On this point, the said Secretary of State, in his report aforesaid, expresses himself as follows, to wit : "As to boundary, that between Georgia and West Florida is the only one which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions within the State of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several States now composing the United States of America were, from their first establishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments, the executive magistrate who presided over the one they had left, and thereby secured in effect a constant

amity with the nation. In this stage of their government, their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in question, was established at the thirty-first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, etc.; secondly, on the proclamation of the British king, in 1763, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, etc. That afterwards, on the 7th day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to wit: ‘In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the king of Great Britain, their chief magistrate, in the year 1763, at a time when no other power pretended any claim whatever to any part of the country through which it ran. The boundary of Georgia was thus established: to begin in the Mississippi, in latitude thirty-one north, and running eastward to the Apalachicola,’ etc. From what has been said,¹ it results, first, that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year 1763: secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it.”

That afterwards, on the 10th day of August, in the year 1795, Thomas Pinckney, Esq., minister plenipotentiary of the United States at the court of Spain, in a communication to the Prince of Peace, prime minister of Spain, agreeable to his instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to wit: “Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England, that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form; by which he established between them precisely the same limits that, near twenty years after, he declared to be the southern limits of the United States, by the treaty which the same King of England concluded with them in the month of November, 1782.”

That afterwards, on the 27th day of October, in the year 1795, a treaty of friendship, limits and navigation was concluded between the United States and his Catholic majesty the King of Spain; in the second article of which treaty, it is agreed, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the river Apalachicola or Catahouchee, thence along the middle thereof, to its junction with the Flint, thence straight to the head of St. Mary's River, and thence down the middle thereof to the Atlantic Ocean.

But whether, upon the whole matter, the State of Georgia, at the time of passing the Act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seized in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, the jury are ignorant, and pray the advisement of the court thereon; and if the court are of opinion, that the said State of Georgia was so seized, at the time aforesaid, then the jury find, that the said State of Georgia, at the time of passing the Act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was seized in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find, that the said Peck, his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

But if the court are of opinion, that the said State of Georgia was not so seized at the time aforesaid, then the jury find, that the said State of Georgia, at the time of passing the Act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was not seized of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof; and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same; and assess damages for the plaintiff, for the breach thereof, in the sum of \$3000, and costs of suit.

Whereupon, it was considered and adjudged by the court below, that on the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled ; and on the last issue, on which there is a special verdict, that the State of Georgia was seized, as alleged by the defendant, and that the defendant recover his costs.

The plaintiff sued out his writ of error, and the case was twice argued, first, by *Martin*, for the plaintiff in error, and by *J. Q. Adams*, and *R. G. Harper*, for the defendant, at February term, 1809, and again at this term, by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant.

Martin, for the plaintiff in error.—The first plea is no answer to the first count. The breach of the covenant complained of is, that “the Legislature had no authority to sell and dispose of” the land, but the plea is, that “the said Matthews, Governor of the said State, was fully and legally empowered to sell and convey” the land. Although the Governor had authority to sell *non constat* that the Legislature had.

The same objection applies to the second plea; it is an answer to the inducement, not to the point of the plea. The breach assigned in the second count is, “that the title which the State of Georgia at any time had in the premises was never legally conveyed to the said Peck, by force of the conveyances aforesaid.” The improper influence upon the members of the Legislature was only inducement. The plea is, the defendant had no notice nor knowledge of the improper means used. It is no answer to the breach assigned. The same objection applies also to the third plea.

It appears upon the special verdict, that the State of Georgia never was seized in fee of the lands. They belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the State of Georgia. When the colonies of North Carolina and South Carolina were royal colonies, the king limited the boundaries, and disannexed these lands from Georgia.

Argument for the *defendant* in error.—The first fault of pleading is in the declaration. The breach of the covenant is not well assigned in the first count. The covenant is, that the Legislature had good right to

sell. The breach assigned is, that the Legislature had no authority to sell. Authority and right, are words of a different signification. Right implies an interest: authority is a mere naked power. But if the breach be well assigned, the plea is a substantial answer to it, for if the Governor derived full power and authority from the Legislature to sell, the Legislature must have had that power to give. The plea shows the title to be in the State of Georgia. The objection is only to the form of the plea, which cannot prevail upon a general demurrer.

Two questions arise upon the issue joined upon the 4th plea. 1st. Whether the title was in the State of Georgia; and 2d. Whether it was in the United States.

At the beginning of the revolution, the lands were within the bounds of Georgia. These bounds were confirmed by the treaty of peace in 1783, and recognized in the treaty with Spain in 1795, and by the cession to the United States in 1802. The United States can have no title but what is derived from Georgia.

The title of Georgia depends upon the facts found in the special verdict. The second charter granted by George II., in 1732, includes these lands, the bounds of that grant being from the Savannah to the Alatamaha, and from the heads of those rivers, respectively, in direct lines, to the South Sea. It is not admitted, that the king had a right to enlarge or diminish the boundaries, even of royal provinces. The exercise of that right, even by Parliament itself, was one of the violations of right upon which the revolution was founded; as appears by the declaration of independence, the address to the people of Quebec, and other public documents of the time. This right, claimed by the king, was denied by Virginia and North Carolina, in their constitutions. See the article of the constitution of Virginia respecting the limits of that State; and the 25th section of the declaration of rights of North Carolina; 1 Belsham's Hist. of Geo. III.; The Quebec Act; and the Collection of State Constitutions, p. 180. The right was denied by the commissioners on the part of the United States, who formed the treaty, and was given up by Great Britain, when the present line was established.

But the proclamation of 1763 did not profess or intend to disannex the western lands from the province of Georgia. The king only declares that it is his royal will and pleasure for the present, "as aforesaid," to reserve under his sovereignty, protection and dominion, for

the use of the Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest; and he thereby forbids his subjects from making purchases or settlements, or taking possession of the same. This clause of the proclamation cannot well be understood without the preceding section to which it refers, by the words "as aforesaid."

The preceding clause is, "that no governor or commander-in-chief of our other colonies or plantations in America, *i. e.* (other than the colonies of Quebec, East Florida and West Florida), do presume, for the present, and until our further pleasure be known, to grant warrants of surveys, or pass patents for any lands beyond the heads or sources of any of the rivers, which fall into the Atlantic Ocean from the west or northwest; or upon any lands whatever which, not having been ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them."

Then comes the clause in question, which is supposed to have disannexed these lands from Georgia, as follows: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid," etc. It was a prohibition to all the governors of all the colonies, and a reservation of all the western lands attached to all the colonies. But it was only a temporary reservation for the use of the Indians.

If this proclamation disannexed these lands from Georgia, it also disannexed all the western lands from all the other colonies. But if they were disannexed by the proclamation, they were reannexed, three months afterwards, by the commission to Governor Wright, on the 20th of January, 1764. It appears by the report of the attorney-general, as well as by Mr. Chalmers's observations, that it never was the opinion of the British government, that these lands were disannexed by the proclamation.

If they were not reannexed before, they certainly were by the treaty of peace. At the commencement of the revolution, the lands then belonged to and formed a part of the province of Georgia. By the declaration of independence, the several States were declared to be free, sovereign and independent States; and the sovereignty of each, not of

the whole, was the principle of the revolution ; there was no connection between them, but that of necessity and self-defence, and in what manner each should contribute to the common cause, was a matter left to the discretion of each of the States. By the second article of the confederation, the sovereignty of each State is confirmed, and all the rights of sovereignty are declared to be retained, which are not by that instrument expressly delegated to the United States in Congress assembled. It provides also, that no State shall be deprived of territory for the benefit of the United States.

On the 25th of February, 1783, the Legislature of Georgia passed an Act declaring her boundaries, before the definitive treaty of peace. This declaration of Georgia was not contradicted by the United States in any public Act. In 1785, Georgia passed an Act erecting the county of Bourbon in that territory ; this produced a dispute with South Carolina, which ended in the acknowledgment of the right of Georgia to these lands. (See the third article of the convention between South Carolina and Georgia.) The same boundaries are acknowledged by the United States in their instructions, given by the Secretary of State, Mr. Jefferson, in 1793, to the commissioners appointed to settle the dispute with Spain respecting boundaries.

The United States certainly had no claim at the commencement of the revolution, nor at the declaration of independence, nor under the articles of confederation. During the progress of the revolution, a demand was made by two or three of the States, that crown lands should be appropriated for the common defence. But Congress never asserted such a right. They only recommended that cessions of territory should be made by the States for that purpose. The journals of Congress are crowded with proofs of this fact. See journals of Congress, 16th September, 1776, vol. 2, p. 336 ; 30th of October, 1776 ; 15th October, 1777, vol. 3, p. 345 ; 27th October, 1777, vol. 3, p. 363 ; 22d June, 1778, vol. 4, p. 262 ; 23d and 25th June, 1778, p. 269 ; 1779, vol. 5, p. 49 ; 21st May, 1779, vol. 5, p. 158 ; 1st March, 1781 ; Resolution of 1780, vol. 6, p. 123 ; 12th February, 1781, vol. 7, p. 26 ; 1st March, 1781 ; 29th October, 1782, vol. 8, p. —.

At the treaty of peace, there was no idea of a cession of land to the United States, by Great Britain. The bounds of the United States were fixed as the bounds of the several States had been before fixed. The United States did not claim land for the United States as a nation ; they

claimed only in right of the individual States. Great Britain yielded the principle of the royal right to disannex lands from the colonies, and acquiesced in the principle contended for by the United States, which was in the old boundary of the several States. See Chief Justice JAY's opinion in the case of *Chisholm v. The State of Georgia*, reported in a pamphlet published in 1793.

The United States, then, had no title by the treaty of peace. She has since (viz., in 1788) declined accepting a cession of the territory from Georgia, not because the United States had already a title, but because the lands were too remote, etc.

There is nothing in the constitution of the United States, which can give her a title. By the third section of the fourth article, the claims of particular States are saved.

The public Acts since the adoption of the new constitution are the instructions to the commissioners in 1793, to settle the boundaries with Spain. The treaty with Spain, 27th October, 1795; the Act of Congress of 7th April, 1798 (1 U. S. Stat. 549); the Act of 10th May, 1800, the remonstrance of Georgia, in December, 1800; and the cession by Georgia to the United States in 1802. All these public Acts recognized the title to be in Georgia.

If then Georgia had good title on the 7th of January, 1795, the next question is, had the Legislature of that State a right to sell? By the revolution, all the right and royal prerogatives devolved upon the people of the several States, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to the State naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. The sale itself was not a legislative act. It was not an act of sovereignty, but a mere conveyance of title. 2 Tucker's Blackst. Com. 53, 57; Montesquieu, lib. 26, c. 15; 2 Dall. 320; *Cooper v. Telfair*, 4 Id. 14; Constitution of Georgia, art. 1, § 16; Digest of Georgia Laws of 7th June, 1777, 1780, 1784, 1785, 1788, 1789 and 1790. These show the universal practice of Georgia in this respect.

A doubt has been suggested, whether this power extends to lands to which the Indian title has not been extinguished. What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is

overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, lib. 1, § 81, p. 37, and § 209; lib. 2, § 97; Montesquieu, lib. 18, c. 12; Smith's Wealth of Nations, b. 5, c. 1. It is a right not to be transferred, but extinguished. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Although the power to extinguish this right by treaty, is vested in Congress, yet Georgia had a right to sell, subject to the Indian claim. The point has never been decided in the courts of the United States, because it has never before been questioned. The right has been exercised and recognized by all the States.

There was no objection to the sale, arising from the constitution of Georgia. With regard to State constitutions, it is not necessary that the powers should be expressly granted, however it may be with the constitution of the United States. But it is not constitutional doctrine, even as it applies to the Legislature of the United States. The old articles of confederation limited the powers of Congress to those expressly granted. But in the constitution of the United States, the word expressly, was purposely rejected. See the Federalist; and Journals of House of Rep. 21st August, 1789; Journal of Senate, 7th September, 1789.

But if the Legislature of Georgia could only exercise powers expressly given, they had no power to abrogate the contract.

A question has been suggested from the bench, whether the right which Georgia had, before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple? The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil, but a right of occupation. A right not individual, but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. Even Penn claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. Hence, the feudal tenures in this country. All the treaties with the Indians were the effect of conquest; all the extensive grants have been forced from them by successful war. The conquerors per-

mitted the conquered tribes to occupy part of the land, until it should be wanted for the use of the conquerors. Hence, the Acts of legislation fixing the lines and bounds of the Indian claims ; hence the prohibition of individual purchasers, etc.

The rights of governments are allodial. The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege, which does not affect the allodial right.

The Legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void ; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary, to say what the law is, or what it was. The Legislature can only say, what it shall be.

The Legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contracts. A grant is a contract executed, and it creates also an implied executory contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

The validity of a law cannot be questioned, because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal to disregard the law. This would open a source of litigation which could never be closed. The law would be differently decided by different juries ; innumerable perjuries would be committed, and inconceivable confusion would ensue. But the parties now before the court are innocent of the fraud, if any has been practised. They were *bona fide* purchasers, for a valuable consideration, without notice of fraud. They cannot be affected by it.

Martin, in reply.—All the western lands of the royal governments were wholly disannexed from the colonies, and reserved for the use of the Indians. Georgia never had title in those lands. It is true, that Great Britain did undertake to extend the bounds of the royal provinces. The right was not denied, but the purpose for which it was executed. By the proclamation, if offenders should escape into those territories,

they are to be arrested by the military force and sent into the colony for trial. In Governor Wright's commission, the western boundary of the colony is not defined. The jury has not found whether the lands were within Governor Wright's commission.

As to the Indian title. The royal provinces were not bodies politic for the purpose of holding lands: the title of the lands was in the crown. There is no law authorizing the several States to transfer their right subject to the Indian title: it was only a right of pre-emption which the crown had; this right was not by the treaty ceded to Georgia, but to the United States. The land, when purchased of the Indians, is to be purchased for the benefit of the United States. There was only a possibility that the United States would purchase for the benefit of Georgia: but a mere possibility cannot be sold or granted. The declarations and claims of Georgia could not affect the rights of the United States.

An attempt was made in Congress to establish the principle that the land belonged to the United States; but the advocates of that doctrine were overruled by a majority. This, however, did not decide the question of right. The States which advocated that principle did not think proper to refuse to join the confederacy, because it was not inserted among the articles of confederation, but they protested against their assent to the Union being taken as evidence of their abandonment of the principle.

Nor is the assent of Congress to the commission for settling the bounds between South Carolina and Georgia, evidence of an acknowledgment, on the part of the United States, that either of those States was entitled to those lands.

March 11th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, upon the pleadings, as follows: In this cause, there are demurrers to three pleas filed in the Circuit Court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant. To support this judgment, this court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words: "that the Legislature of the said State (Georgia), at the

time of the passing of the Act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said Act." The breach of this covenant is assigned in these words: "now the said Fletcher saith that, at the time when the said Act of the Legislature of Georgia, entitled an Act, etc., was passed, the said Legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said Act." The plea sets forth the constitution of the State of Georgia, and avers that the lands lay within that State. It then sets forth the Act of the Legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said Act, and that the Governor was legally empowered to sell and convey the premises. To this plea, the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted, that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted, that he has not denied it. The breach alleged is, that the Legislature had not authority to sell. The bar set up is, that the Governor had authority to convey. Certainly, an allegation, that the principal has no right to give a power, is not denied, by alleging that he has given a proper power to the agent.

It is argued, that the plea shows, although it does not, in terms, aver, that the Legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative. Had the plaintiff tendered an issue in fact upon this plea, that the Governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration; for the count to which this plea is intended as a bar alleges no want of authority in the Governor. He was, therefore, under the necessity of demurring.

But it is contended, that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective. The defect alleged in the declaration is, that the breach is not assigned in the words of the covenant. The covenant is, that the Legislature had a right to convey, and the breach is, that the Legislature had no authority to convey. It is not necessary that a breach should be assigned in the very words of the covenant. It is enough,

that the words of the assignment show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the Legislature had no authority to convey, it had no right to convey.

It is, therefore, the opinion of this court, that the Circuit Court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought, therefore, to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration. The cause having been again argued at this term—

March 16th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of that State.

The first count in the declaration set forth a breach in the second covenant contained in the deed. The covenant is, "that the Legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act." The breach assigned is, that the Legislature had no power to sell. The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting act, and avers the power of the Legislature to sell and dispose of the premises as pointed out by the act. To this plea, the plaintiff below demurred, and the defendant joined in demurrer.

That the Legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the Legislature

to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. In this case, the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the Act of 1795. The court cannot say that, in passing that act, the Legislature has transcended its powers, and violated the constitution. In overruling the demurrer, therefore, to the first plea, the Circuit Court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor. The second count assigns, in substance, as a breach of covenant, that the original grantees from the State of Georgia promised and assured divers members of the Legislature, then sitting in General Assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and under such influence, did vote for the passing of the said bill; by reason whereof, the said law was a nullity, etc., and so the title of the State of Georgia did not pass to the said Peck, etc. The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or

either of them, to any of the members of the Legislature of the State of Georgia. To this plea, the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted, how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null, whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the Legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned. Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia, to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this

deed, and assigns, as a breach, that some of the members of the Legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that, therefore, the act is a mere nullity. This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the Legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the Legislature which passed the law. The circuit court, therefore, did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired, by virtue of any subsequent act of any subsequent Legislature of the State of Georgia. The third count recites the undue means practised on certain members of the Legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent Legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void. After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice. To this plea, there is a demurrrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court. The lands in controversy vested absolutely in James Gunn, and others, the original grantees, by the conveyance of the Governor, made in pursuance of an Act of Assembly, to which the Legislature was fully compétent. Being thus in full possession of the legal estate, they, for a valuable consideration, con-

veyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also. The Legislature of Georgia was a party to this transaction ; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people; and when their agents are unfaithful, the acts of those agents cease to be obligatory. It is, however, to be recollectcd, that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded. If the Legislature be its own judge in its own case, it would seem equitable, that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties ; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who

had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned. A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the Legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the Legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the Legislature so to exert it.

It is not intended to speak with disrespect of the Legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any Legislature to apply it. The principle is this: that a Legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case, the Legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation, so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate, without knowledge of any secret fraud which might have led to an emanation

of the original grant. According to the well-known course of equity, their rights could not have been affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the Legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass; and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted, whether the nature of society and of government does not prescribe some limits to the Legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the Legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the Legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected sovereign power, on whose Legislature no other restrictions are imposed than may be found in its own constitu-

tion. She is a part of a large empire ; she is a member of the American union ; and that union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the Legislatures of the several States, which none claim a right to pass. The constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution ? In considering this very interesting question, we immediately ask ourselves, what is a contract ? Is a grant a contract ? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing ; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed ; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange, if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision ? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself ? The words themselves contain no such distinction. They

are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment ; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment ; and the constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form, the power of the Legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter ?

The State Legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The Legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate ? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder ; why, then, is it allowable in the form of a law annulling the original grant ?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say, that the State had passed a law absolving itself from the contract? It is scarcely to be conceived, that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. In overruling the demurrer to the third plea, therefore, there is no error.

The first covenant in the deed is, that the State of Georgia, at the time of the Act of the Legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. The fourth count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia. To this count, the defendant pleads, that the State of Georgia was seized; and tenders an issue on the fact in which the plaintiff joins. On this issue, a special verdict is found.

The jury find the grant of Carolina by Charles II. to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea. They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and

South Carolina. That seven of the eight proprietors of the Carolinas surrendered to George II. in the year 1729, who appointed a Governor of South Carolina. That in 1732, George II. granted to the Lord Viscount Percival and others, seven-eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia. That the Governor of South Carolina continued to exercise jurisdiction south of Georgia. That in 1752, the grantees surrendered to the crown. That in 1754, a Governor was appointed by the crown, with a commission describing the boundaries of the colony. That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola.

That in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters. That in November, 1763, a commission was issued to the Governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent States. That in April, 1787, a convention was entered into between the States of South Carolina and Georgia, settling the boundary line between them. The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that State and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposi-

tion. They contend, that the reservation for the use of the Indians, contained in the proclamation of 1763, except the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular State. The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the royal Governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the Governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the Court, that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted, whether a State can be seized in fee of lands, subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion, that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State.

Judgment affirmed, with costs.

JOHNSON, J.—In this case, I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare, that a State does not possess the power

of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity. A contrary opinion can only be maintained upon the ground, that no existing Legislature can abridge the powers of those which will succeed it. To a certain extent, this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it, is to commit a species of political suicide. In fact, a power to produce its own annihilation, is an absurdity in terms. It is a power as utterly incomminicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in no wise necessary to its political existence; they are entirely accidental, and may be parted with, in every respect, similarly to those of the individuals who compose the community. When the Legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his, is his country's.

As to the idea, that the grants of a Legislature may be void, because the Legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure, for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate Legislature corrupt. The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas, that I may have it distinctly under-

stood, that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted, that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the State Legislatures. Whether the words, "Acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by BLACKSTONE. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation," which certainly imports an existing moral or physical necessity. Now, a grant or conveyance by no means necessarily implies the continuance of an obligation, beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio*, the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The States and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases, affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of Legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the State powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when

necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count, we are called upon substantially to decide, "that the State of Georgia, at the time of passing the act of cession, was legally seized in fee of the soil (then ceded), subject only to the extinguishment of part of the Indian title." That is, that the State of Georgia was seized of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem, that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favor of it, but to me it appears, that the facts in the case are sufficient to support the opinion that the State of Georgia had not a fee-simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles. The question is, whether it can be correctly predicated of the interest or estate which the State of Georgia had in these lands, "that the State was seized thereof, in fee-simple." To me it appears, that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seized to a use.

The correctness of this opinion will depend upon a just view of the State of the Indian nations. This will be found to be various. Some have totally extinguished their national fire, and submitted themselves to the laws of the States; others have, by treaty, acknowledged that they hold their national existence at the will of the State within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil: the latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it

unnecessary to insist upon their right of soil. Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation? It is awkward, to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple interest may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the States in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest, or of purchase, exclusively of all competitors, within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits, except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was anything more than a mere possibility, it certainly was reduced to that State, when the State of Georgia ceded to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

At the time of the formation of the Federal Constitution the great principle of the inviolability of contracts was written into the law of the United States, and this inviolability, not only as between the parties

thereto but as against the State sovereignties, entering into that great political compact, in their relations with individual citizens, was secured by Article I. section 10. With the general principle we have not here to do, but only with the application of it to the tenure of real property held or affected by a grant from a State, as to which the law may be stated to be—that the Constitution protects an executed as well as an executory contract; that a grant of land, or a grant attaching an immunity to land, under proper circumstances, is an executed contract; and that a State as a party to the contract will not be allowed to use her sovereignty to withdraw from or annul the same, any more than it will be allowed to impair the obligation of a contract by releasing a private person therefrom. This is the doctrine set forth by Chief Justice MARSHALL in the principal case, and is expressly recognized and followed in *The Town of Pawlet v. Clark*, 9 Cr. 292; *Doe ex d. Stanmire v. Taylor*, 3 Jones, Law, 207; *Bruce v. Schuyler*, 9 Ill. 221; *Grammar School v. Burt*, 11 Vt. 632; *Grogan v. San Francisco*, 18 Cal. 590. The doctrine rests entirely on the contractual relation of the States, entered into in and through the constitution; acts, therefore, done by any State before entering into the Union cannot be questioned afterwards. This position is well illustrated by the case of *League v. De Young*, 11 How. 185, in which case it was sought to apply the above doctrine to the revocation of certain patents for land in Texas.. It appeared that the Republic of Texas had issued certain patents for land; that counterfeits thereof were issued; and that, in 1840, an Act was passed appointing a board to ascertain the true patents; that, in 1843, a statute of limitations was enacted, barring all persons who did not institute suits upon their patents before January 1, 1844. Texas was not admitted to the Union until 1845. On this state of facts the court held, that if Texas, by an act of Legislature or a constitution, adopted prior to her admission in the Union, had abolished all patents or grants, such action would have been within her power, and the United States could not have afterwards interfered, GRIER, J., saying: “The restraints imposed by that instrument upon the legislative power of the several States could affect them only after they became States of the Union under the provisions of the Constitution and had consented to be bound by it.”

Grant Protected need not be an express one made after the formation of the Union..

The grant to be entitled to constitutional protection need not be an express one, made by the State under its present form of government and after the adoption of the Federal Constitution, but a contract will be

protected which has been raised by a post-revolutionary recognition of a right or title existing before the Revolution. This is well illustrated by the case of *Terrett v. Taylor*, 9 Cr. 43, the facts of which were as follows: In Virginia, before the Revolution, the Episcopal Church possessed, with reference to holding property, all the rights of the Church of England as at common law. In 1776, after the Declaration of Independence, the Legislature passed an act confirming the rights of the Church, and, in 1784, an act erecting parishes into corporations and vesting the title to their property in trustees. In 1786, the latter act was repealed, property rights being saved, but in 1798 all the prior legislation on the subject was repealed as inconsistent with the principles of religious liberty established under the new order of things, and in 1801 the State passed an act asserting the title to all the property of Episcopal Churches to be in the State, and ordering a sale thereof. The Supreme Court of the United States held that the Act of 1776 operated as a new grant by the State and was irrevocable, STORY, J., saying: "If the Legislature possessed the authority to make such a grant and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which would support the doctrine that a legislative grant is revocable on its own nature and held only *durante bene placito*. Such a doctrine would upset the very foundation of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired." The constitutional protection has been so far extended as to cover anterевolutionary gifts made by the crown; for the State, taking the sovereignty, is held to have assumed the acts of the person formerly exercising the sovereignty, and hence to avoid his acts would be to avoid its own, *Society for the Propagation of the Gospel v. The Town of New Haven*, 8 Wheat. 464, and see also the famous *Dartmouth College Case*, 4 Id. 518.

Grant Inferred from Compact between States.

The grant protected may be one contained in, or inferred from, a compact made between States with the assent of the United States; thus, in *Green v. Biddle*, 8 Wheat. 1, it appeared that by the seventh article of the compact between Virginia and Kentucky, upon the separation of the latter from the former, it was agreed that "all private rights and interests of lands derived from the laws of Virginia shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." Kentucky was afterwards admitted to the Union;

in 1797 and in 1812 her Legislature passed acts materially affecting land rights. The Supreme Court held that Congress by admitting Kentucky had ratified the compact between her and the parent State, Virginia, and that the rights secured by the compact could not be affected by subsequent legislation; and see also *Lowry v. Francis*, 2 Yerg. 534.

Protection not Lost because Grant is on Condition Precedent.

It is held that the rule of protection is not affected by the fact that the grant is upon condition precedent, no title passing until the condition is performed, and that such a grant is not repealable, *Montgomery v. Kasson*, 16 Cal. 189.

Or on Account of Mere Informality.

An informality, in the form of a grant, where there has been a clear grant by the Legislature, will not render it liable to be overthrown by the legislative will; thus an act of Legislature declaring that "twenty-five thousand acres shall be allotted for and given to Major-General Greene" was held a present gift, within the constitutional protection, notwithstanding the fact that the laws of Rhode Island required land grants to bear the seal of the State, *Rutherford v. Greene's Heirs*, 2 Wheat. 196; and the grant at the time of being made need not have been of particular property; thus where there was a grant to the college established within a certain county of all land which should escheat within said county, a special act granting the land of a certain person, who had died without heirs, to another purpose was held void, as an interference with a vested right, *Rock Hill College v. Board of School Commissioners*, 47 Md. 1, and see *Den ex d. Trustees of the University v. Foy*, 1 Murph. 58; both of these cases, however, were rested on the prohibition of the destruction of vested rights adopted as principles of the jurisprudence of the States, and not on the provision of the Federal Constitution.

Violation Inhibited may be Indirect.

An attempted violation of the grant may be indirect, and the Constitution is equally powerful to frustrate such an attempt; thus where a grant is of land to be held for a particular purpose, an act authorizing its sale for a different, though kindred, purpose will be void; so in *Lowry v. Francis*, 2 Yerg. 534, under the compact between Tennessee and North Carolina, land had been set aside for the use of the schools of a section, an act was passed ordering it to be sold and appropriating the proceeds

of the sale to the maintenance of common schools throughout the State. The act was held unconstitutional.

Grant to Municipality.

The fact that the grantee is a municipal corporation will not deprive it of the constitutional protection where the land has been granted to it in the same manner in which it might have been granted to any private corporation or person, the principle of political subordination, which generally prevents an act affecting a municipality being regarded as a contract, not extending to the tenure of property. The question was discussed in *Grogan v. San Francisco*, 18 Cal. 590, in delivering the opinion in which case FIELD, C. J., said: "Nor is there any difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers for local purposes they are mere instruments of the State for the convenient administration of the government, and their powers are under the entire control of the Legislature; they may be qualified, enlarged, restricted or withdrawn at its discretion. 'But these bodies,' says KENT, 'may also be empowered to take and hold private property for municipal uses and such property is invested with the security of other private rights.' . . . A legislative grant is an executed contract and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of a contract. This was expressly decided by the Supreme Court of the United States in *Fletcher v. Peck*, 6 Cr. 137. It cannot therefore be destroyed and the estate divested by any subsequent legislative enactment, and though a municipal corporation is the creature of the Legislature, yet where the State enters into a contract with it the subordinate relation ceases and that equality arises which exists between all contracting parties, and, however great the control of the Legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts." In the case cited, the State had by an act of Legislature transferred certain lands to the city of San Francisco; the city authorities passed an ordinance to sell the land in question, but the ordinance had not received the majority made requisite by law to authorize such a sale; a sale was however made under the ordinance, and afterwards an act of Legislature was passed empowering the city treasurer to execute deeds for the land so sold; it was held that the statute was void and that the State could not thus divest the city of the title which had never legally passed from it. While the doctrine of this case

may not be open to question, and while it may well be that while the State suffers the municipality to exist as a corporation, it will not be allowed to treat it as existing for some purposes and not for others, yet it may be said that the protection afforded in such a case is not a very efficient one, should it ever become a matter of State policy to destroy a grant to a municipal corporation, for on the repeal of the charter all the rights of government which had been delegated to the creature, all the property conveyed to it that it might the better carry out the purpose for which it was created, would return to and vest in the sovereign creator, which would then deal with the property as its own.

Grant under General Statute.

The grant which the State is forbidden to violate may be found in a general statute, under which rights have accrued; thus after land has been sold for taxes, an act which extends the time of redemption of land sold at a tax sale is void so far as it attempts to affect lands sold before its passage, *Dikeman v. Dikeman*, 11 Paige, 484. On the same principle, where a general act exists appropriating lands which may escheat to a particular corporation or body, an act passed after an escheat though before possession by the State, waiving the State's rights or appropriating the lands to another purpose will be void, see *ante*, p. 498.

Protection Extends to Use as well as Title.

The protection of the grantee against legislation extends not only to the title but to the use of his land, and an act which interferes with a legal use of the land granted, or imposes upon it any burden or servitude for the public use, is void, *People v. Platt*, 17 Johns. 195, and see *Glover v. Powell*, 2 Stockt. 211. In the first of these two cases the defendant's ancestor had received by patent an unnavigable river; the defendant erected a dam, and was indicted under an act, passed subsequently to his patent, which required all owners of dams in certain sections of the State to alter them so that they would not obstruct the course of salmon. It was held that the act, so far as it affected the right of Platt to dam as he pleased, was unconstitutional.

Police Power.

The State may, however, in the exercise of its police power, interfere with the use of property by the passage of an act which falls within the definition and scope of a police regulation. Thus in *The Corporation of*

the Brick Presbyterian Church v. The Mayor, etc., of New York, 5 Cow. 538, the plaintiff held a title from the defendant with a covenant for quiet enjoyment. The land covered by the title was used as a cemetery. Afterwards, in pursuance of authority given by an act of Legislature, the defendants passed an ordinance prohibiting interments on the plaintiff's lot. It was held that the act of the municipality, being by legislative authority, must be regarded as the act of the State; that it was beyond the ability of the defendants to limit by contract its legislative power on matters of strictly public moment; and that the ordinance in question was a proper exercise of the police power of the State. This decision was followed in *Coates v. Mayor, etc., of New York*, 7 Cow. 585.

Course of Descent may be Changed.

It is no part of the contract under which lands are granted that they shall descend in accordance with the law as it stood at the time of the grant, for the rules of descent are entirely within legislative control and the State can alter them at will, *Watson v. Thompson*, 12 R. I. 466; *Gregley v. Jackson*, 38 Ark. 487; *Lee v. Smith*, 18 Tex. 141, though it cannot by an act, passed subsequently to a descent cast, alter the descent of land which has once taken place, *Jackson ex d. McClaughry v. Lyon*, 9 Cow. 664.

State may Provide for Ascertainment of Title.

The State may also by a statute provide for the ascertainment of the title of lands granted by it. This question was considered in *Jackson ex d. Hart v. Lamphire*, 3 Pet. 280. In that case, which was in ejectment, both the plaintiff and the defendant claimed the land in dispute through one Cornelius, to whom a patent therefor had been granted, in 1790, in consideration of his military services. The plaintiff claimed through a deed from Cornelius to one Hart, dated January 17, 1784, and deposited for record on April 25, 1795. The defendant claimed through a deed from Cornelius to one Brown, dated June 23, 1784, and recorded April 3, 1795. Many disputes having arisen with reference to the title to lands in Onondaga County, in which county the particular land was situated, the Legislature of New York, in 1797, passed an act referring all such disputed titles to a Board of Commissioners. This board, in 1799, found in favor of the title held by the defendant, and which was acquired by him after the decision. The plaintiff contended that the patent issued to Cornelius was a contract with him, his heirs and assigns that they should take and hold the land free from any legislative regulation to be made in violation of the contract

of the State, and that the act for the settlement of titles violated the obligation of the contract. The Supreme Court, however, took a different view and, in delivering the opinion, BALDWIN, J., after adverting to the argument of the plaintiff, said: "The court are not inclined to adopt this reasoning or to consider this as a case coming fairly within the clause of the Constitution of the United States relied on by the plaintiff. The only contract made by the State is a grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land; and we do not in this case feel at liberty to create one by implication. The State has not by this act impaired the force of the grant; it does not profess or attempt to take the land from the assignees of Cornelius and give it to one not claiming under him, neither does the award produce that effect; the grant remains in full force, the property conveyed is held by the grantee and the State asserts no claim to it. The question between the parties is which of the deeds from Cornelius carries the title. Presuming that the laws of New York authorized a soldier to convey his bounty land before receiving a patent, and that at the date of the deeds there was no law compelling the patentees to record them, they would take priority from their date. This is the legal result of the deeds, but there is no contract on the part of the State that the priority of title shall depend solely on the principles of the common law or that the State shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of State Legislatures to pass recording acts by which the elder grantee shall be postponed to the younger if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitation and their effect."

Exemption from Taxation.

Where lands have been granted by the State free from taxation the State cannot afterwards impose a tax upon them or repeal the exemption, *New Jersey v. Wilson*, 7 Cr. 164; *McGee v. Mathis*, 4 Wall. 143; this also applies where the State has exempted lands granted for a certain purpose of public interest by private persons, *Osborne v. Humphrey*, 7 Conn. 335; *Landon v. Litchfield*, 11 Id. 251; or where there is an express exemption of the land held, forever, *University v. People*, 9 Otto, 309; but

the exemption from taxation to be valid and irrevocable must, it seems, rest upon a consideration or be a condition in the grant, or the Legislature will not be held to have effectively barred its successors from exercising one of the great powers of the government, *Rector et al. of Christ Church v. Philadelphia*, 24 How. 300; *Tucker v. Ferguson*, 22 Wall. 527; *West Wisconsin R. W. Co. v. Board of Supervisors*, 93 U. S. 595. The law upon this subject is well stated in *Herrick v. Town of Randolph*, 13 Vt. 528, by REDFIELD, J., as follows: "Such an exemption from taxation as would deprive the Legislature of the power to tax these lands could only be claimed on the ground that it did, at the time of the grant, favor a condition or else a consideration of such grant. . . . Where lands are granted by the Legislature to private persons, either natural or artificial, and conditions beneficial to the grantee are annexed to the grant, there can be no good ground of doubt that both the grant and all such conditions are irrevocable, and any act of the Legislature repealing such grant or annulling such conditions is absolutely void. And it is not perhaps important whether such grant was upon any pecuniary consideration or not. If it was in terms general and perpetual, and there was no implied limitation or right of revocation, and the grant was fully executed and accepted, it would not perhaps be important whether it was upon a sale or gift. In the present case there was not in the terms of the charter of the town of Randolph any express exemption of this right of land from taxation. There was no act of the Legislature connected with the granting of the charter which contained any declaration to that effect. Had this been the case, it would have been of the same effect as if that condition had been contained in the charter of the town. . . . Neither was there any constitutional or other general provision of the law there in force whereby all lands granted by the State or by individuals to pious and charitable uses were declared perpetually exempt from taxation. The only statute or law in force at the time this charter was granted, which is relied upon by the plaintiff, was the general listing law which provided that ministers of the gospel and the president of the college shall have all their property lying in the same town where they dwell exempt, as also shall all lands sequestered to public, pious and charitable uses be exempted. This enactment is contained in a proviso to the general listing act which was in force both at the time the charter of Randolph was granted and when the land in question was leased by the selectmen of that town. Now it is in vain to say that this is equivalent to a general declaration of the Legislature that all such lands should be forever exempt from taxation." And the general policy of the law in this respect is succinctly stated by SWAYNE, J., in *Tucker v. Ferguson*:

"The taxing power is vital to the function of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good where such contracts are not forbidden. But the contract must be shown to exist; there is no presumption in its favor. Every reasonable doubt should be resolved against it. When it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and remains a trust created for the good of all." And see also *Gilman v. Sheboygan*, 2 Black, 510; *Easton Bank v. Commonwealth*, 10 Pa. St. 450; *People v. Roper*, 35 N. Y. 629.

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